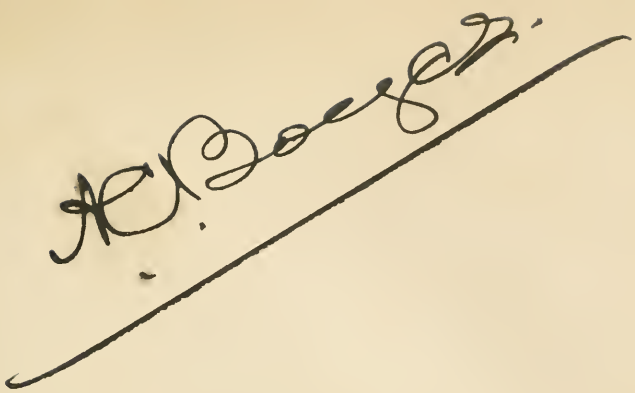


THE LAW

OF

LIBEL AND SLANDER

THE EVIDENCE, PROCEDURE, AND PRACTICE,

BOTH IN

CIVIL AND CRIMINAL CASES,

AND

PRECEDENTS OF PLEADINGS,

WITH

A CHAPTER ON THE NEWSPAPER LIBEL AND REGISTRATION ACT, 1881.

BY

W. BLAKE ODGERS, M.A., LL.D.

LATE SCHOLAR AND LAW STUDENT OF TRINITY HALL, CAMBRIDGE,
OF THE MIDDLE TEMPLE AND THE WESTERN CIRCUIT, BARRISTER-AT-LAW.

FROM THE SECOND ENGLISH EDITION.

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TO

ARTHUR CHARLES, Esq., Q.C,

RECORDER OF BATH,

IN ACKNOWLEDGMENT OF MANY KINDNESSES,

I Dedicate this Book.

PREFACE

TO THE SECOND EDITION.

The law relating to Libel and Slander has undergone considerable modification since the First Edition of this Book was published in February, 1881. In August, 1881, the Newspaper Libel and Registration Act became law; two years later the general practice of the High Court was altered in many respects by the Rules of the Supreme Court, 1883; while in the Chancery Division a practice has sprung up of granting injunctions in cases of libel and slander, which is not in accordance with the former procedure. Two new Chapters have, therefore, been added in this Edition—one on the Act of 1881, the other on Injunctions; while the Chapters on Costs and Practice in Civil Cases have been much modified.

The Chapter on Blasphemous Words has been entirely re-written, and by the kind permission of Lord Coleridge, C.J., I am enabled to add in an Appendix [* vi.] the revised Edition of his Lordship's summing up in the case of *R.* v. *Ramsey and Foote.*

All decisions reported since 1881 have been noted down to the date of publication, and the whole Book carefully revised.

W. B. O.

4, Elm Court Temple, E.C.,
June, 1887.

PREFACE

TO THE FIRST EDITION.

This book has been called "A Digest of the Law of Libel and Slander," because an attempt has been made to state the law on each point in the form of an abstract proposition, citing the decided cases in smaller type merely as illustrations of that abstract proposition.

Every reported case decided in England or Ireland during the last fifteen years has been noticed. Every case reported in England during this century has, I believe, been considered and mentioned, unless it has either been distinctly overruled or has become obsolete by a change in the practice of the Courts or by the repeal of some statute on which it depended. The earlier cases have been more sparingly cited, but I think no case of importance since 1558 has been overlooked. The leading American decisions have also been referred to, and whenever the American law differs from our own the distinction has been pointed out and explained. Canadian and Australian decisions have also been quoted, whenever the English law was doubtful or silent on the point. The cases have been brought down to the early part of January, 1881.

It would be of but little use to place all these decisions before the reader and leave him to draw his own conclusions. A huge collection of reported cases piled one on the top of the other is not a legal treatise, any more than a tumbled pile of bricks is a house. I have throughout attempted to strike a balance, as it were, and state the net result of the authorities. But this is a process requiring the greatest care and much expenditure of time. When I commenced this book in 1876, I did not at all realize the amount of labor which was requisite in order to ascertain the law and state it clearly in an abstract form. [*vii.]

It is often very difficult to determine whether or no a decision has ceased to be a binding authority: our judges in the present day seldom expressly overrule a previous decision; they comment on it,

distinguish it, explain it away, and then leave it with its lustre tarnished, but still apparently a binding authority should identically the same facts recur. There is no rule which decides how long the process of "blowing upon" a case must continue before it may be considered overruled. Whenever such a case has been cited, I have always referred the reader to the places where it has been criticised, adding, however, my own opinion as to the effect of such criticism on the authority of the case. And in many places it has been necessary to review the cases in a note, showing how they bear one on another, and justifying the view which I have taken of their result. Such notes are printed in a medium type, smaller than that devoted to the abstract propositions of the Digest, larger than the Illustrations which follow them.

My object throughout has been to save the reader trouble. All the references to every decision have always been cited. All considerations of style, &c., have been sacrificed to clearness and convenience. I have abruptly changed from the third to the first or second person, whenever there was any possibility of mistaking the antecedent of any pronoun. It is sometimes difficult to follow A., B., and C., through a long sentence: it is easier to distinguish between "I," "you," and "he." Again, whenever I have been in doubt whether the law on a particular subject should be noticed in one chapter or in another, I have invariably stated it in both. Thus, nearly the whole of the chapter on Malice will be found scattered up and down the long chapter on Privilege. So, too, for the sake of practical convenience, all the cases as to the Innuendo and the construction to be put on Defamatory Words, have been collected in Chapter III. In Chapter XIV. all the law as to Husband and Wife, Principal and Agent, &c., &c., has been gathered together under the somewhat stilted but convenient title of The Law of Persons. A separate chapter has been devoted to the subject of Costs. In the chapters on Blasphemous and Seditious Words, I have not hesitated to express freely my conviction that many of the early decisions would not be followed in the present day.

One difficulty connected with the subject matter of the book I [*ix.] have endeavored to avoid, by restoring the word "malice" to its simple and ordinary meaning. The distinction between "malice in law" and "malice in fact" is of comparatively recent origin. "Malice in law" is the vaguest possible phrase; it merely denotes "absence of legal excuse." The plaintiff is never called on to prove the existence of "malice in law;" the defendant has to show the existence of some legal excuse. In short, to say that

a libel must be published "maliciously," means merely that it must be published "on an unprivileged occasion." I have therefore abandoned this technical and fictitious use of the word. Throughout this book (to use the words of Brett, L.J., in *Clark* v. *Molyneux*, see p. 271) "'Malice' does not mean 'malice in law,' a term in pleading, but actual malice, that which is popularly called malice."

The second part of the book is devoted to Practice, Procedure, and Evidence. I have fought both a civil action and a criminal trial through from beginning to end, giving practical hints to each side. Indeed, I have taken up the subject at an earlier point than is usual in law books, and have submitted to the plaintiff certain matters which he should carefully consider before he issues his writ (p. 513).

In the Appendix will be found a full collection of Precedents of Pleadings, both in Civil and Criminal cases. Some are drawn from the reports; others are hypothetical cases of my own invention; but the majority are pleadings in actions in which friends of mine, or I myself, have been professionally engaged.

W. Blake Odgers.

5, Hare Court, Temple, E.C.,
February, 1881.

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PART I.

THE LAW OF LIBEL AND SLANDER.

CHAPTER I.

INTRODUCTORY.

No man may disparage or destroy the reputation of another. Every man has a right to have his good name maintained unimpaired. This right is a *jus in rem*, a right absolute and good against all the world.

Words which produce any perceptible injury to the reputation of another are called DEFAMATORY.

Defamatory words, if false, are actionable.

False defamatory words, if written and published, constitute a libel; if spoken, a slander.

Words which on the face of them *must* injure the reputation of the person to whom they refer, are clearly defamatory, and, if false, are actionable without proof that any particular damage has followed from their use.

Words, on the other hand, which merely *might tend* to injure the reputation of another are *primâ facie* not defamatory, and even though false are not actionable, unless as a matter of fact some appreciable injury has followed from their use.

Illustrations.

To say "A. is a coward," or "a liar," or "a rascal," is not defamatory, unless it can be proved that some one seriously believed and acted on the assertion, to the prejudice of A. Such words, though false, are not actionable without some [*2] evidence to show that A.'s reputation has as a matter of fact been actually impaired thereby. *De minimis non curat lex.*

To say of B.:—"He forged his master's signature to a cheque for 100*l.*" is clearly defamatory, and, if false, actionable. It must injure B.'s reputation to bring such a specific charge against him.

In any given case, the fact that the words employed by the defendant have perceptibly injured the plaintiff's reputation may be either

(i) presumed from the nature of the words themselves; or,

(ii) proved by evidence of their consequences.

(i) It will be presumed from the nature of the words themselves,
 (*a*) If the words, being written and published or printed and published, disparage the plaintiff or tend to bring him into ridicule and contempt.
 (*b*) If the words, being spoken,
 (1) charge the plaintiff with the commission of a crime ;
 (2) impute to the plaintiff a contagious disorder tending to exclude him from society ;
 (3) are spoken of the plaintiff in the way of his profession or trade, or disparage him in an office of public trust.

In all these cases the words are said to be actionable *per se*, because on the face of them they clearly must have injured the plaintiff's reputation.

(ii) But in all other cases of spoken words, the fact that the plaintiff's reputation has been injured thereby, must be proved at the trial by evidence of the consequences that directly resulted from their utterance. Such evidence is called "evidence of *special* damage," as distinguished from that *general* damage which the law assumes, without express proof, to follow from the employment of words actionable *per se*.

Illustrations.

To say of A. "He is a forger and a felon," or "He hath the French pox," to call a physician a quack, or a tradesman a bankrupt, to say of a magistrate that [*3] he is a corrupt judge, is in each case actionable without proof of special damage. *A fortiori*, if the words be written, or printed, and published.

But to call a man a cheat, a rogue, and a swindler, or to call a woman an adulteress, is not actionable, without proof of special damage, if the words be spoken only ; but is actionable *per se*, if the accusation be reduced into writing and published to the world.

Thus the presumption that words are defamatory arises much more easily in cases of libel than in cases of slander. Many words which if printed and published would be presumed to have injured the plaintiff's reputation, will not be actionable *per se*, if merely spoken. Two reasons are usually given for this distinction :—

1. A slander may be uttered in the heat of a moment, and under a sudden provocation ; the reduction of the charge into writing and the subsequent publication of a libel show greater deliberation and malice.

2. *Vox emissa volat ; litera scripta manet.* The written or printed matter is permanent, and no one can tell into whose hands it may come. Every one now can read. The circulation of a newspaper is enormous, especially if it be known to contain libellous matter ; and many people implicitly believe every word they see in print. And even a private letter may turn up in after years, and reach persons for whom it was never intended, and so do incalculable mischief. Whereas a slander only reaches the immediate bystanders, who can observe the manner and note the tone of the speaker,—who have heard the antecedent conversation which may greatly qualify his assertion,—who probably are acquainted with the speaker, and know what value is to be attached to any charge

made by him ; the mischief is thus much less in extent, and the publicity less durable.

This sharp distinction between slander and libel has been recognized in English law by Hale, C. B., in *King* v. *Lake*, 2 Vent. 28 ; Hardres, 470 ; by Lord Hardwicke, C.J., in *Bradley* v. *Methwyn*, Selw. N. P. 982, and by Lord Mansfield, C.J., in *Thorley* v. *Lord Kerry*, 4 Taunt. 355 ; 3 Camp. 214, n., and in numerous other cases, and is far too well established to be ever shaken.

The intention or motive with which the words were employed is, as a rule, immaterial. If the defendant has in fact injured the plaintiff's reputation, he is liable, although he did not intend so to do, and had no such purpose in his mind when he spoke or wrote the words. Every man must be presumed to intend and to know the [*4] natural and ordinary consequences of his acts : and this presumption (if indeed it is ever rebuttable) is not rebutted merely by proof that at the time he uttered or published the words the defendant did not attend to or think of their natural or probable consequences, or hoped or expected that these consequences would not follow. Such proof can only go to mitigate the damages.

Sometimes, however, it is a man's duty to speak fully and freely, and without thought or fear of the consequences ; and then the above rule does not apply. The words are privileged by reason of the occasion on which they were employed ; and no action lies therefor, unless it can be proved that the defendant was actuated by some special spite or some wicked and malicious motive. (See *post*, Chapters VIII. and IX.) But in all other cases (although the pleader invariably alleges that the words were spoken or published falsely *and maliciously*) malice in fact need never be proved at the trial ; the words are actionable, if false and defamatory, although spoken or published accidentally or inadvertently, or with an honest belief in their truth.

"That unfortunate word 'malice' has got into cases of actions for libel. We all know that a man may be the publisher of a libel without a particle of malice or improper motive. Therefore the case is not the same as where actual and real malice is necessary. Take the case where a person may make an untrue statement of a man in writing, not privileged on account of the occasion of its publication ; he would be liable although he had not a particle of malice against the man." Per Lord Bramwell in *Abrath* v. *North Eastern Rail. Co.*, 11 App. Cas. at pp. 253, 254 ; 55 L. J. Q. B. at p. 460 ; 55 L. T. at p. 65.

Illustrations.

The Protestant Electoral Union published a book called "The Confessional Unmasked." Their motive in so doing was "not only innocent but praiseworthy," viz.:—to promote the spread of the Protestant religion, by exposing the abuses of the Roman Catholic system ; but certain passages in the book were necessarily obscene. *Held* that its publication was a misdemeanor. All copies which the defendant had for sale were ordered to be destroyed as obscene books. Neither the law nor the religion of England permits anyone to "do evil that good may come."

R. v. *Hicklin*, L. R. 3 Q. B. 360 ; 37 L. J. M. C. 89 ; 16 W. R. 801 ; 18 L. T. 395 ; 11 Cox, C. C. 19.

[* 5] *Steele* v. *Brannan*, L. R. 7 C. P. 261 ; 41 L. J. M. C. 85 ; 20 W. R. 607 ; 26 L. T. 509.
And see *R.* v. *Bradlaugh and Besant*, 2 Q. B. D. 569 ; 46 L. J. M. C. 286.

If a man deliver *by mistake* a paper out of his study where he had just written it ; he will it seems be liable to an action, if the paper prove libellous, although he never intended to publish that paper, but another innocent one.
Note to *Mayne* v. *Fletcher*, 4 M. & Ry. 312 ; 9 B. & C. 382 ; cf. *R.* v. *Payne*, 5 Mod. 167.

The plaintiff told a laughable story against himself in company : the defendant published it in the newspaper to amuse his readers, assuming that the plaintiff would not object. The plaintiff recovered damages, 10*l*.
Cook v. *Ward*, 6 Bing. 409 ; 4 M. & P. 99.

For though he told it of himself to his friends, he by no means courted public ridicule. And that the publication was "*only in jest*" has long been held no defence.

Where a clergyman in a sermon recited a story out of Foxe's Martyrology, that one Greenwood being a perjured person and a great persecutor, had great plagues inflicted upon him, and was killed by the hand of God ; whereas in truth, he never was so plagued, and was himself actually present at that discourse,—the words being delivered only as a matter of history, and not with any intention to slander, it was adjudged for the defendant.
Greenwood v. *Prick*, Cro. Jac. 91, cited in 1 Camp. 270 ; and also in *R.* v. *Williams*, 13 How. St. Tr. 1387.

But Lord Denman and the Court of Q. B. said most positively in *Hearne* v. *Stowell*, 12 A. & E. 726, that this case is not law. Mr. Greenwood would therefore in the present day have recovered at least nominal damages.

The proprietor of the *Times* retired to live in the country, leaving the entire management of the paper to his son, with whom he never interfered ; yet he was held *criminally* liable for a libel which appeared in the paper in his absence and without his knowledge. And though now since Lord Campbell's Act he would probably be acquitted in any criminal proceeding, he would certainly be held liable for damages in a civil action.
R. v. *Walter*, 3 Esp. 21.
R. v. *Gutch and others*, Moo. & Mal. 433.
R. v. *Dodd*, 2 Sess. Cas. 33.

A corporation is liable for a libel published by its authority ; although the corporation, as distinct from its members, cannot be guilty of malice in the ordinary sense of the word.
Per Lord Bramwell in *Abrath* v. *North Eastern Rail. Co.*, 11 App. Cas. at pp. 253, 254 ; 55 L. J. Q. B. at p. 460; 55 L. T. at pp. 65, 66.

Even a lunatic is liable to an action for libel or slander unless his insanity is well known to all who hear or read his words, in which case no damage would be incurred, as the words would produce no effect.
Dickinson v. *Barber*, 9 Mass. 225.
Yeates et ux. v. *Reed et ux.*, 4 Blackf. 463.

A barrister, editing a book on the Law of Attorneys, referred to a case, *Re Blake*, as reported in 30 Law Journal, Q. B. 32, and stated that Mr. Blake was struck off the rolls for misconduct. He was in fact only suspended for two years, as appeared from the Law Journal report. The publishers were held [*6] liable for this carelessness, although of course neither they nor the writer bore Mr. Blake any malice. Damages 100*l*.
Blake v. *Stevens and others*, 4 F. & F. 232 ; 11 L. T. 543.

The printers of a newspaper by a mistake in setting up in type the announcements from the *London Gazette*, placed the name of the plaintiff's firm under the heading "First Meetings under the Bankruptcy Act" instead of under "Dissolutions of Partnership." An ample apology was inserted in the next issue : no damage was proved to have followed to the plaintiff ; and there was no suggestion of any malice. In an action for libel against the proprietor of the paper, the jury awarded the plaintiff 50*l*. damages. *Held* that the publication was libellous, and that the damages awarded were not excessive.
Shepherd v. *Whitaker*, L. R. 10 C. P. 502 ; 32 L. T. 402.

False defamatory words then, if spoken, constitute a slander: if written and published, a libel. The word "written" includes any printed, painted, or any other permanent representation not transient in its nature as are spoken words.

The writing may be on paper, parchment, copper, wood, or stone, or on any kind of substance in fact; and may be made with any instrument, pen and ink, blacklead pencils (*Geary* v. *Physic*, 5 B. & C. 238), or in chalk, &c. A picture or effigy may also be a libel, or any other mark or sign exposed to view and conveying a defamatory meaning. (5 Rep. 125.)

Illustrations.

A caricature or scandalous painting is a libel.
Anon., 11 Mod. 99.
Austin v. *Culpepper*, 2 Show. 313; Skin. 123.
Du Bost v. *Beresford*, 2 Camp. 511.

A chalk mark on a wall may be a libel, and as the wall cannot conveniently be brought into Court, secondary evidence may be given of the inscription.
Mortimer v. *M'Callan*, 6 M. & W. 58.
Tarpley v. *Blaby*, 7 C. P. 395.
See *Spall* v. *Massey and others*, 2 Stark. 559.

Burning a man in effigy may be a libel on him; but those who merely stand by looking on are not liable.
Eyre v. *Garlick*, 42 J. P. 68.

A statue may be a libel; so is fixing up a gallows against a man's door.
Hawkins' Pleas of the Crown, 8th edition, 542; 5 Rep. 125, b.

Hieroglyphics, a rebus, an anagram, or an allegory may be a libel.
Ironical praise may be a libel.

There is a further important distinction between slander and libel. Every libel is a crime; a slander on a private [*7] individual is not. It is only when the words uttered are blasphemous, seditious or obscene that the State is concerned to interfere and punish the speaker.

It is, I think, clearly necessary that there should be a criminal as well as a civil remedy for libel, for the following reasons:—

1. The evil done by libels is so extensive, the example set so pernicious, that it is desirable that they should be repressed for the public good. Slanders do less mischief as a rule, are not permanent, and are more easily forgotten; their evil influence is not so widely diffused.
2. Most libellers are penniless, and a civil action has no terrors for them. The plaintiff will never get his damages. In fact the proprietor of many a low newspaper rather rejoices at the prospect of a civil action for libel being brought against him. He regards it as a gratuitous advertisement for his paper, calculated to increase its circulation in these degenerate days.
3. Another reason often assigned for the interference of the State is, that libels conduce to a breach of the peace; but that reason would, I think, apply with equal, if not greater force to slanders.

Lush, J., says, in *R.* v. *Holbrook*, 4 Q. B. D. at p. 46, "Libel on an individual is, and has always been, regarded as both a civil injury and a criminal offence. The person libelled may pursue his

remedy for damages or prefer an indictment, or by leave of the Court a criminal information, or he may both sue for damages and indict. It is ranked amongst criminal offences because of its supposed tendency to arouse angry passion, provoke revenge, and thus endanger the public peace, but the libeller is not the less bound to make compensation for the pecuniary or other loss or injury which the libel might have occasioned to the person libelled."

The fact that libel is a crime as well as a tort, produces other consequences in law which it may be well to briefly notice here, though they are not strictly within the scope of the present treatise.

No action can be maintained for the price of libellous pictures (*Fores* v. *Johnes*, 4 Esp. 97), or for their value, if destroyed by the person ridiculed. (*Du Bost* v. *Beresford*, 2 Camp. 511.) A printer cannot recover for printing a libel. (*Poplett* v. *Stockdale*, Ry. & M. 337; *Bull* v. *Chapman*, 8 Ex. 104.) If a printer undertakes to print a book for a certain price, and discovers as the work proceeds that the matter is defamatory, he may decline to continue the work, and can recover for such part of the work printed as is not defamatory in an [*8] action for work and labour done and materials provided, the special contract notwithstanding. (*Clay* v. *Yates*, 1 H. & N. 73; 25 L. J. Ex. 237; 4 W. R. 557; 27 L. T. (Old S.) 126.) Nor can an action be maintained for breach of a contract to furnish manuscript of defamatory matter (*Gale* v. *Leckie*, 2 Stark. 107), or of a contract to let rooms to be used for the delivery of blasphemous lectures (*Cowan* v. *Milbourn*, L. R. 2 Ex. 230; 36 L. J. Ex. 124; 15 W. R. 750; 16 L. T. 290), or for pirating a libellous book (*Stockdale* v. *Onwhyn*, 5 B. & C. 173; 7 D. & R. 625; 2 C. & P. 163). There is no copyright in any libellous or immoral book, or picture. A Court of Equity will not interfere in one way or another. It will not grant an injunction to restrain a piracy of an illegal book or picture nor decree an account of the profits made thereby. (Per Lord Eldon, in *Walker* v. *Walker*, 7 Ves. 1; in *Southey* v. *Sherwood*, 2 Mer. 435, and in *Lawrence* v. *Smith*, Jacob, 471.)

No contract will be implied to indemnify a party against the consequences of an illegal act, such as the publication of a libel; and any express promise to that effect is void (*Shackell* v. *Rosier*, 3 Sc. 59; 2 Bing. N. C. 634; *Arnold* v. *Clifford*, 2 Sumner, 238); for it is a promise on an illegal executory consideration, an incitement to do an illegal act. And the proprietor of a newspaper convicted and fined for the publication of a libel which was inserted in his paper without his knowledge or consent by the editor, has no right of action against the editor for the damages sustained through such conviction. (*Colburn* v. *Patmore*, 1 C. M. & R. 73; 4 Tyr. 677; and see *Merryweather* v. *Nixan*, 2 Sm. L. C. 8th ed. 546; 8 T. R. 186; *Moscati* v. *Lawson*, 7 C. & P. at p. 35.) Even an express promise to indemnify another if he will publish a libel is void. But it has been decided in America that an express promise to indemnify another against the consquences of an illegal act already done is binding. (*Griffiths* v. *Hardenburgh*, 41 N. Y. 469; *Howe* v. *Buffalo & Erie Rail Co.*, 38 Barbour (N. Y.) 124.)

So, too, a promise to abstain from publishing a libel is no consideration for a contract. (*Brown* v. *Brine*, 1 Ex. D. 5 ; 45 L. J. Ex. 129; 24 W. R. 177 ; 33 L. T. 703.)

Criminal proceedings for libel may be taken either at common law, or under certain statutes; the remedy may be either by indictment or information; though informations are only granted in urgent cases, where the publication of the libel is likely to produce great public mischief and must therefore be promptly suppressed.

[*9] Thus we see that there are two criminal remedies for libel —by criminal information and by indictment,—in addition to the civil remedy of action for damages. It is right that there should be a criminal remedy as well as a civil one ; but is it essential that there should be *two* criminal remedies ? Might not the remedy by indictment—involving as it does, a triple investigation of the charge, before the magistrate, the grand jury, and the petty jury—be abolished ? The remedy by way of criminal information would insure the punishment of all offenders in whose conviction the public were interested, while an end would be put to the numerous petty indictments for libel which are obviously vexatious, and tendered solely through personal malice. Moreover, on the argument of the rule, the defendant himself may make an affidavit, whereas in proceeding by indictment, the defendant's mouth is more or less closed. If one or two of the rules relating to criminal information were relaxed, I think it would be found that the lesser criminal remedy might safely be dispensed with, and yet that no offender, whose publications were a serious outrage on society, would escape the punishment he so justly merited. The Newspaper Libel and Registration Act is a step in this direction, sect. 3 requiring that no indictment shall be presented against the proprietor, publisher, editor, or any other person responsible for the publication of a newspaper for any libel published therein without the written *fiat* of the Director of Public Prosecutions : and such *fiat* will be refused whenever the Director considers that a civil action will meet the requirements of the case. Thus, now an indictment against a newspaper involves a fourfold investigation of the facts. I still retain the opinion expressed in the former editon of this book that the better method would be to abolish altogether indictments for defamatory libels, and to allow criminal informations to be filed in all cases in which the Court shall be of opinion that the civil remedy by action is an insufficient protection to the public.

Lush, J., says, in the passage cited *ante*, on p. 7, the person libelled may "both sue for damages and indict ;" and so in strict law he may. But practically he has to elect between his three remedies. He cannot take both civil and criminal proceedings at once ; a judge would stay one or the other. Strictly, if he means to take both, he should take criminal proceedings first. But an action for damages after the defendant had been either acquitted or convicted for the same libel would be very hopeless work. And so would a criminal prosecution after an action. After a rule for a criminal *information* had been made absolute, no civil action can

be brought. R. v. *Sparrow*, [*10] 2 T. R. 198.) If it be refused or discharged, the applicant can indict the defendant, or, by leave of the Court, he may bring a civil action : see *post*, p. 523.

The person defamed has a civil remedy to recover damages, and he can also proceed criminally by way of information or indictment, and have the defamer punished as an offender against the State. But there is now no method of anticipating or preventing a libel or a slander ; there is no longer any censorship of the press in this country. Any man is free to speak or to write and publish whatever he chooses of another, subject only to this, that he must take the consequences, should a jury deem his words defamatory. This is what is meant by "the liberty of the press." (*Commonwealth* v. *Blanding*, 3 Pick. (20 Mass.) 313.)

"The liberty of the press," says Lord Mansfield, in *R.* v. *Dean of St. Asaph*, 3 T. R. 431, n., "consists in printing without any previous licence, subject to the consequences of law." Lord Ellenborough says in *R.* v. *Cobbett*, 29 Howell's St. Tr. 49 : "The law of England is a law of liberty, and consistently with this liberty, we have not what is called an *imprimatur ;* there is no such preliminary licence necessary ; but if a man publish a paper, he is exposed to the penal consequences, as he is in every other act, if it be illegal." Lord Kenyon shortly puts it thus in *R.* v. *Cuthell*, 27 Howell's St. Tr. 675 : "A man may publish anything which twelve of his countrymen think is not blamable."

But it was by no means always so in England. It was quickly perceived that the printing-press may be as great a power for evil as for good. And whenever any large proportion of any nation is disaffected towards the Government, to allow a free press is almost impossible.

(i) The first plan adopted by our English monarchs was to keep all the printing-presses in their own hands, and allow no one to *print* anything except by special Royal licence. All printing-presses were thus kept under the immediate supervision of the King in Council, and regulated by proclamations and decrees of the Star Chamber by virtue of the King's prerogative. In 1557 the Stationers' Company [*11] of London was formed. The exclusive privilege of printing and publishing in the English dominions was thus given to ninety-seven London stationers and their successors by regular apprenticeship, and the Company was empowered to seize all publications by men outside their guild. Later, by a decree of the Star Chamber in 1586, one printing press was allowed to each University.

(ii) Not content with this government monopoly of the "Art and mysterie of Printing," which continued, in theory at all events, till 1637, Queen Elizabeth, in 1559, determined to have all books read over by loyal bishops and privy councillors before they were allowed to go to the official press. In 1586 the Star Chamber enacted that all books should be read over in manuscript, and licensed by either the Archbishop of Canterbury or the Bishop of London, save law books which were to be read and licensed by the Chief Justice of either Bench or the Lord Chief Baron (a practice which continued

down to the middle of the last century ; see the prefaces to Burrows' and Douglas' Reports). Subsequently the Master of the Revels usurped the right of revising poems and plays, and the Vice-Chancellors of the Universities were allowed for convenience sake to license books to be printed at the University presses. It was soon found impossible to restrict the number of printing-presses in the country, and the Government therefore insisted all the more vehemently that no book should be *published* without a previous licence. By the Star Chamber decree dated July 11th, 1637, all printed books were required to be submitted to the licensers and entered upon the registers of the Stationers' Company before they could be published ; if this was not done, the printer was to be fined, and for ever disabled from exercising the art of printing, and his press and all copies of the unlicensed book forfeited to the Crown. The old word "*Imprimatur*"="let it be *printed*," was still used to denote the consent of the licenser to its *publication*. After the abolition of the Star Chamber, the Long Parliament issued two orders, March 9th, 1642, and June 14th, 1643, very similar in effect to the decree of the Star Chamber last mentioned. Against these orders Milton published his noble but ineffectual protest, the "Areopagitica" (November 24th, 1644). The censorship of the press continued in England till 1695, and then its abolition was rather accidental than otherwise. (See Macaulay's "History of England," c. xix., vol. iii., pp. 399—405 ; 13 & 14 Car. II. c. 33 ; Proclamation of May 17th, 1680 ; 1 Jac. II. c. 17.) The only vestige remaining of such censorship is the control of the Lord Chamberlain over plays. By the Theatres Regulation Act, 1843 (6 & 7 Vict. c. 68), s. 14, it is enacted [* 12] that it shall be lawful for the Lord Chamberlain for the time being, whenever he shall be of opinion that it is fitting for the preservation of good manners, decorum, or of the public peace so to do, to forbid the acting or presenting any stage play, or any act, scene, or part thereof, or any prologue or epilogue, or any part thereof, anywhere in Great Britain, or in such theatres as he shall specify, and either absolutely or for such time as he shall think fit.

(iii) A third plan is to allow any book to be printed and published without any supervision or licence; but as soon as the attention of the Government is called to its harmful tendencies, to seize all the stock at the publishers and booksellers, and prevent the publisher from issuing any further copies. The Lord Lieutenant was till the year 1875 empowered to do this in Ireland, should any work appear to him seditious. Magistrates in England may deal thus with books proved to be obscene by virtue of Lord Campbell's Act (20 & 21 Vict. c. 83). The Court of Chancery and the House of Lords have occasionally by injunction forbidden the further publication of libels which they deemed contempts of Court. But in all other cases, neither the Crown nor any Court of law can restrain the indiscriminate sale or distribution of any work, however pernicious they may deem it to be, till it has been found to be a libel. (See Chapter XI., *post*, p. 337.

(iv) Our present law permits any one to say, write, and publish

what he pleases; but if he make a bad use of this liberty, he must be punished. If he unjustly attack an individual, the person defamed may sue for damages; if, on the other hand, the words be written or printed, or if treason or immorality be thereby inculcated, the offender can be tried for the misdemeanor either by information or indictment. In order that the criminal might be easily detected, it was enacted in 1712 that no person, under a penalty of 20*l.*, should sell or expose for sale any pamphlet without the name and place of abode of some known person by or for whom it was printed or published, written, or printed thereon. (10 Anne, c. 19, s. 113, repealed in 1871 by the 33 & 34 Vict. c. 99.) A similar enactment as to newspapers, 6 & 7 Will. IV. c. 76, was also repealed by the 32 & 33 Vict. c. 24. And now every paper or book which is meant to be published or dispersed must bear on it the name and address of the printer (2 & 3 Vict. c. 12, s. 2); and the printer must for six calendar months carefully preserve at least one copy of each paper printed by him, and write thereon the name and address of the person who employed and paid him to print it. (39 Geo. III. c. 79, s. 29.) And now by the Newspaper Libel and Registration Act, 1881 (44 & 45 Vict. c. 60) a register of newspaper proprietors is established [*13] at Somerset House, where any one can ascertain for a shilling who is the person responsible for what has appeared in any newspaper. Newspapers were indeed formerly regarded with great jealousy by the Government, and subjected to heavy duties. Under Charles II. and James II. the *London Gazette* (a small sheet appearing twice a week, every Monday and Thursday) was the only paper permitted to publish political news. Even their size was regulated by statute. The 6 Geo. IV. c. 119, first allowed newspapers to be printed on paper of any size. Moreover, till the 18 Vict. c. 27, they had to be printed on stamped paper. But in spite of all such petty restrictions, our press has been, ever since the passing of Fox's Libel Act, 32 Geo. III. c. 60, the freest in the world.

A man's reputation may also be injured by the deed or action of another without his using any words; and for such an injury he has an action on the case; but such cases are not within the scope of the present treatise.

Illustrations.

A banker having in his hands sufficient funds belonging to his customer dishonours his cheque: the customer may recover substantial damages, without proof of any special damage; for it is clear that such an act must injure the customer's reputation for solvency.

Marzetti v. *Williams*, 1 B. & Ad. 415.
Robinson v. *Marchant*, 7 Q. B. 918; 15 L. J. Q. B. 134; 10 Jur. 156.
Rolin and another v. *Steward, P. O.*, 14 C. B. 595; 23 L. J. C. P. 148; 18 Jur. 576; 2 C. L. R. 759.

Defendant caused plaintiff's goods to be seized on an unfounded claim for debt; the neighbours consequently deemed the plaintiff insolvent. The plaintiff was held entitled to substantial damages.

Brewer v. *Dew and another*, 11 M. & W. 625.
Bracegirdle v. *Orford*, 2 Maule & S. 77.

The defendant set up a lamp on the wall adjoining the plaintiff's dwelling-

house and he kept it burning in the daytime, thereby inducing the passers-by to believe that plaintiff's house was a brothel. This was held to be a trespass to the wall and being permanent in its nature also a libel in effigy.

Jefferies v. *Duncombe*, 2 Camp. 3 ; 11 East, 226.
Spall v. *Massey*, 2 Stark. 559.
Plunket v. *Gilmore*, Fortescue, 211.

And so as to "riding Skimmington," "rough music," burning in effigy, and other modes of holding a man up to public obloquy without especial *words* of defamation,

See *Sir William Bolton* v. *Dean*, cited in *Austin* v. *Culpepper*, Skin. 123 ; 2 Show. 313.
R. v. *Roberts and others*, 3 Keble, 578.
Mason v. *Jennings*, Sir T. Raym. 401.
Cropp v. *Tilney*, 3 Salk. 226.
Eyre v. *Garlick*, 42 J. P. 68.

[* 14] So too in actions of false imprisonment and malicious prosecution, the jury may award damages for the injury done to the plaintiff's reputation by the charge made against him, and by his being marched in custody through the public streets ; although in the former, the gist of the action is the direct trespass to the *person*, and in the latter the maliciously setting the law in motion without reasonable or probable cause.

In Roman law there are many instances given in which a man's reputation was assailed, not by words, but by acts. *E. g.* :

(i) By refusing to accept a solvent person as surety for a debt, intending thereby to impute that he is insolvent. (D. 2, 8, 5, 1.)
(ii) By claiming a debt that is not due, or seizing a man's goods for a fictitious debt, with intent to injure his credit. (Gai. III. 220; Just. Inst. IV. iv. 1 ; D. 47, 10, 15, 33.)
(iii) By claiming a person as your slave, knowing him to be free. (D. 47, 10, 12, & 22.)
(iv) By forcing your way into the house of another. (D. 47, 10, 23, & 44.)
(v) By persistently following about a matron or young girl respectably dressed, such constant pursuit being an imputation on their chastity. (Gai. III. 220 ; Just. Inst. IV. iv. 1 ; D. 47, 10, 15, 15—22.)
(vi) By needlessly fleeing for refuge to the statue of the emperor, thereby making it appear that some one was unlawfully oppressing you. (D. 48, 16, 28, 7); though it is difficult to see in this case how it was determined who was the right plaintiff.

On the other hand, words may cause a man damage without in any way affecting his reputation ; and for such words, if spoken without lawful occasion, an action on the case will lie, provided it can be shown that such damage is the natural and necessary consequence of the words, or was the result which the speaker intended and designed.

Illustration.

I.—WORDS DISPARAGING SOMETHING, OR IMPUGNING PLAINTIFF'S TITLE THERETO.

If A. falsely and maliciously disparages an article which B. makes or sells, and special damage results therefrom, an action lies, although no imputation was cast on B.'s personal or professional character.

Young v. *Macrae*, 3 B. & S. 264 ; 32 L. J. Q. B. 6 ; 11 W. R. 63 ; 9 Jur. N. S. 539 ; 7 L. T. 354.
And see pp. 147—150.

To assert falsely and unnecessarily that there is a flaw in my title to the freehold I own, is actionable if I thereby am prevented from selling it.

Banister v. *Banister*, 4 Rep. 17.
And see pp. 138—147.

To say falsely that a ship is unseaworthy, intending thereby to deter seamen

[* 15] from sailing in her, is actionable if in consequence they refuse to go to sea in her.

Casey v. *Arnott*, 2 C. P. D. 24 ; 46 L. J. C. P. 3 ; 25 W. R. 46 ; 35 L. T. 424.

To set up a false and foundless claim of lien on goods I have bought is actionable, if special damage ensue.

Green v. *Button*, 2 C. M. & R. 707.

N.B. An attack on a man's property or on the things he makes or sells may sometimes be also an indirect attack on himself. See pp. 30, 133.

II.—Words disparaging the reputation of some person other than the plaintiff.

As a rule, A. cannot sue for words defamatory of B. although he may suffer loss or inconvenience therefrom. It is generally impossible to satisfy the Court that the speaker intended this result or that it is the natural and necessary consequence of his words.

Ashley v. *Harrison*, 1 Esp. 48 ; Peake, 164 *vel* 256.

Brayne v. *Cooper*, 5 M. & W. 249.

A brother cannot sue for slander of his sister.

Subbaiyar v. *Kristnaiyar and another*, I. L. R., 1 Madras, 383.

Defendants attended the funeral ceremony of Premji Ludha, the headman of the Karàd caste, and there before a large concourse of people made a violent attack on the moral and religious character of the deceased, declaring that he was "patit," a term of great opprobrium and reproach among Hindoos. Many of those assembled left at once in consequence, and the family of the deceased suffered great pain and annoyance, and also were much lowered in public estimation. Plaintiff sued as the heir and nearest relation of the deceased for damages. *Held* no action lay.

Luckumsey Rowji v. *Hurbun Nursey and others*, I. L. R., 5 Bom. 580.

But see *R.* v. *Topham*, 4 T. R. 126, *post*, p. 424.

But a husband may recover, without joining his wife as a co-plaintiff, for damage caused to himself by words defamatory solely of her.

Baldwin v. *Flower*, 3 Mod. 120.

Guy v. *Gregory*, 9 C. & P. 584.

Dengate v. *Gardiner*, 4 M. & W. 5 ; 2 Jur. 470.

Wilson v. *Goit*, 3 Smith (17 N. Y. R.) 445.

If A. and B. are rival shopkeepers, and B. spreads a false and groundless report that A.'s shopman has the scarlet fever, intending thereby to prevent the public from going to A.'s shop, and succeeds in this malicious device, A. can sue B.

Per Kelly, C. B., in *Riding* v. *Smith*, 1 Ex. D. 96 ; 45 L. J. Ex. 281 ; 24 W. R. 487 ; 34 L. T. 500.

III.—Other words.

"Undoubtedly all words are actionable if a special damage follows."

Per Heath, J., in *Moore* v. *Meagher*, 1 Taunt. 44.

If a man induces a servant to break his contract with his master and quit his employment, the master has an action *per quod servitium amisit*.

Lumley v. *Gye*, 2 E. & B. 216 ; 22 L. J. Q. B. 463 ; 17 Jur. 827.

Bowen v. *Hall and others*, 6 Q. B. D. 333 ; 50 L. J. Q. B. 305 ; 29 W. R. 367 ; 44 L. T. 75 ; J. P. 373.

[* 16] If a man menace my tenants at will, of life and member, *per quod* they depart from their tenures, an action upon the case will lie against him, but the menace without their departure is no cause of action.

Conesby's Case, Year Book, 9 Hen VII., pp. 7, 8 ; 1 Roll. Abr. 108.

If defendant threatens the plaintiff's workmen, so that they do not dare to go on with their work, whereby the plaintiff loses the selling of his goods, an action lies.

Garret v. *Taylor* (1621), Cro. Jac. 567 ; 1 Roll. Abr. 108.

Tartleton and others v. *McGawley*, Peake 270.

And see *Springhead Spinning Co.* v. *Riley*, L. R. 6 Eq. 551 ; 37 L. J. Ch. 889 ; 16 W. R 1138 ; 19 L. T. 64.

Skinner v. *Kitch*, L. R. 2 Q. B. 393 ; 36 L. J. M. C. 322 ; 15 W.R. 830 ; 16 L. T. 413.

If a man should lie in wait " and fright the boys from going to school, that schoolmaster might have an action for the loss of his scholars."

Per Holt, C. J., in *Keeble* v. *Hickeringill*, 11 East, 576, n.

Plaintiff was making money at Glasgow by printing silk handkerchiefs with an ornamental design ; defendant, hoping to acquire that design for himself, falsely represented to the plaintiff that it was a registered pattern, that the true owner had compelled him to give up plaintiff's name, and was about to proceed against plaintiff in Chancery for an injunction ; plaintiff, naturally alarmed, stayed the execution of certain orders in hand for handkerchiefs with that design ; and travelled up to London to explain matters to the supposed true owner ; defendant meanwhile went on printing and selling silk handkerchiefs printed with the design, *Held*, that the plaintiff had a good cause of action, it appearing that defendant had knowingly uttered a falsehood with intent to deprive plaintiff of a benefit and acquire it to himself, and the damage naturally flowing from plaintiff's belief in the truth of defendant's statement.

Barley v. *Walford*, 9 Q. B. 197 ; 15 L. J. Q. B. 369 ; 10 Jur. 917.

CHAPTER II. [*17]

DEFAMATORY WORDS.

WORDS which produce any appreciable injury to the reputation of another are called DEFAMATORY.

Diffamare est in malâ famâ ponere (Bartol). The question in each case therefore is: Has the reputation of this individual plaintiff been appreciably impaired in consequence of the words employed by the defendant? No general rule can be laid down defining absolutely and once for all what words are defamatory and what not. Words which would seriously injure A.'s reputation might do B.'s no harm. Each case must be decided on its own facts.

Defamation was formerly an ecclesiastical offence, cognizable only in the spiritual court; and then defamatory words would be such as the ecclesiastical court would punish. But all such suits were abolished by the 18 & 19 Vict. c. 41. So now it is convenient to use the word "Defamation" as a general term embracing both "Slander" and "Libel." See 6 & 7 Vict. c. 96, s. 6.

If in any given case the words employed by the defendant have appreciably injured the plaintiff's reputation, then the plaintiff has suffered an injury which is actionable without proof of any damage. Every man has an absolute right to have his person, his property, and his reputation, preserved inviolate. "His reputation is his property, and, if possible, more valuable than other property." (Per Malins, V. C., in *Dixon* v. *Holden*, L. R. 7. Eq. 492; 17 W. R. 482; 20 L. T. 357.) "Indeed, if we reflect on the degree of suffering occasioned by loss of character, and compare it with that occasioned by loss of property, the amount of the [*18] former injury far exceeds that of the latter." (Per Best, C.J., in *De Crespigny* v. *Wellesley*, 5 Bing. at p. 406.) And just as any invasion of a man's property is actionable without proof of any pecuniary loss, so is any disparagement of his reputation. "It was the rule of Holt, C.J., to make words actionable whenever they *sound to the disreputation of the person* of whom they were spoken, and this was also Hale's and Twisden's rule, and I think it a very good rule." (Per Fortescue, J., in *Button* v. *Heyward*, 8 Mod. 24, referring perhaps to *Baker* v. *Pierce*, 6 Mod. 24.)

Whenever the words clearly "sound to the disreputation" of the plaintiff, there is no need of further proof, they are defamatory on the face of them, and actionable *per se*. The injury to the reputation is the gist of the action, and wherever that is clear, there is no need to inquire whether there is any injury to the pocket as well. But where it is by no means clear from the words themselves

that they *must* have injured the plaintiff's reputation, there the Court requires proof of some special damage to show that as a matter of fact the words have in this case impaired the plaintiff's good name. Words which are merely uncivil, words of idle abuse, will not touch his credit, and, therefore, are clearly no ground for an action, unless it can be shown that in fact some appreciable damage to the plaintiff has followed from their use. The injury for which compensation is sought must be capable of being assessed by a jury. *De minimis non curat lex.*

Mr. Townshend, the author of a learned American treatise on Slander and Libel, appears to me to fall into an error on this point. He devotes a whole chapter to maintaining "that pecuniary loss to the plaintiff is the gist of the action for slander or libel. If the language published has not occasioned the plaintiff pecuniary loss (actual or implied), then no action can be maintained. In theory, the action for slander or libel is always for the pecuniary injury, and not for the injury to the reputation" (c. iv.). He might as well contend that the gist of an action of assault and battery was the doctor's bill the plaintiff had to pay. Surely the injury to the [*19] plaintiff's reputation is the gist of the action, and special damage is but evidence of that injury, and is necessary only where without some such evidence it would not be clear that the plaintiff's reputation had in fact been impaired. This is the law in America as well as in England; see the judgments of the Court of Appeals in *Terwilliger* v. *Wands*, 3 Smith (17 N. Y. R.), 59, 63, and *Wilson* v. *Goit*, *ibid.* 443.

PART I.

LIBEL.

In cases of libel, any words will be deemed defamatory which expose the plaintiff to hatred, contempt, ridicule, or obloquy, which tend to injure him in his profession or trade, or cause him to be shunned or avoided by his neighbors.

"Everything, printed or written, which reflects on the character of another, and is published without lawful justification or excuse, is a libel, whatever the intention may have been." (Per Parke, B., in *O'Brien* v. *Clement*, 15 M. & W. 435.) The words need not necessarily impute disgraceful conduct to the plaintiff; it is sufficient if they render him contemptible or ridiculous. (*Cropp* v. *Tilney*, 3 Salk. 226; *Villers* v. *Monsley*, 2 Wils. 403; *Watson* v. *Trask*, 6 Ohio, 531.)

Any written words are defamatory which impute to the plaintiff that he has been guilty of any crime, fraud, dishonesty, immorality, vice, or dishonorable conduct, or has been accused or suspected of any such misconduct; or which suggest that the plaintiff is

suffering from any infectious disorder; or which have a tendency to injure him in his office, profession, calling or trade. And so, too, are all words which hold the plaintiff up to contempt, hatred, scorn, or ridicule, and which, by thus engendering an evil opinion [*20] opinion of him in the minds of right-thinking men, tend to deprive him of friendly intercourse and society.

A libel need not necessarily be in writing or printing. Any caricature or scandalous painting or effigy will constitute a libel. (5 Rep. 125 b; *Anon.*, 11 Mod. 99; *Austin* v. *Culpepper*, 2 Show. 313; Skin. 123; *Jeffries* v. *Duncombe*, 11 East, 226; *Du Bost* v. *Beresford*, 2 Camp. 511.) But it must be something permanent in its nature, not fleeting as are spoken words.

It appears to be impossible to define a libel with any greater precision or lucidity. I proceed at once therefore to give instances.

Illustrations.

It is libellous to write and publish of a man that he is—

"an infernal villain,"
Bell v. *Stone*, 1 B. & P. 331;

"an impostor,"
Cooke v. *Hughes*, R. & M. 112;
Campbell v. *Spottiswoode*, 3 B. & S. 769; 32 L. J. Q. B. 185; 9 Jur. N. S. 1069; 11 W. R. 569; 8 L. T. 201;

"a great defaulter,"
Warman v. *Hine*, 1 Jur. 820;

"a hypocrite,"
Thorley v. *Lord Kerry*, 4 Taunt. 355; 3 Camp. 214 n.;

"a frozen snake,"
Hoare v. *Silverlock*, (No. 1, 1848), 12 Q. B. 624; 17 L. J. Q. B. 306; 12 Jur. 695;

"a rogue and a rascal,"
Per Gould, J., in *Villers* v. *Monsley*, 2 Wils, 403;

"a dishonest man,"
Per cur. in *Austin* v. *Culpepper*, Skin. 124; 2 Show. 314;

"a mere man of straw,"
Eaton v. *Johns*, 1 Dowl. N. S. 602;

"an itchy old toad,"
Villers v. *Monsley*, 2 Wils. 403;

"a desperate adventurer," association with whom "would inevitably cover" a gentleman "with ridicule and disrepute,"
Wakley v. *Healey*, 7 C. B. 591; 18 L. J. C. P. 241;

that "he grossly insulted two ladies,"
Clement v. *Chivis*, 9 B. & C. 172; 4 M. & R. 127;

that "he is unfit to be trusted with money,"
Cheese v. *Scales*, 10 M. & W. 488; 12 L. J. Ex. 13; 6 Jur. 958;

that "he is insolvent and cannot pay his debts,"
Metropolitan Omnibus Co. v. *Hawkins*, 4 H. & N. 87; 28 L. J. Ex. 201; 5 Jur. N. S. 226; 7 W. R. 265; 32 L. T. (Old S.) 281;

[*21] that "he was once in difficulties," though it is stated that such difficulties are now at an end,
Cox v. *Lee*, L. R. 4 Ex. 284; 38 L. J. Ex. 219;

that plaintiff "will not sue in a particular county, because he is known there."
Cooper v. *Greeley*, 1 Denio (N. Y.) 347;

that he is "the most artful scoundrel that ever existed," "is in every person's debt," that "his ruin cannot be long delayed," that "he is not deserving of the slightest commiseration."
Rutherford v. *Evans*, 6 Bing. 451; 8 L. J. (Old S.) C. P. 86;

that he is "at the head of a gang of swindlers," that he is "a common informer, and has been guilty of deceiving and defrauding divers persons with whom he had dealings,"

l'Anson v. *Stuart*, 1 T. R. 748; 2 Smith's L. C. 6th ed. 57;
R. v. *Saunders*, Sir Thos. Raym. 201;

that the plaintiff sought admission to a club and was black-balled, and bolted the next morning without paying his debts,

O'Brien v. *Clement*, 16 M. & W. 159; 16 L. J. Ex. 76; 4 D. & L. 343.

So it is libellous to write and publish of a landlord that he put in a distress in order to help his insolvent tenant to defraud his creditors.

Haire v. *Wilson*, 9 B. & C. 643; 4 M. & R. 605.

It is libellous for a defendant to write a letter charging his sister with having unnecessarily made him a party to a Chancery suit, and adding, "It is a pleasure to her to put me to all the expense she can."

Fray v. *Fray*, 17 C. B. N. S. 603; 34 L. J. C. P. 45; 10 Jur. N. S. 1153.

It is libellous to write of a lady applying for relief from a charitable society, that her claims are unworthy, and that she spends all the money given her by the benevolent in printing circulars filled with abuse of the society's secretary.

Hoare v. *Silverlock* (No. 1, 1848), 12 Q. B. 624; 17 L. J. Q. B. 306; 12 Jur. 695.

It is libellous to charge the plaintiff with having published a libel.

Brookes v. *Tichborne*, 5 Exch. 929; 20 L. J. Ex. 69; 14 Jur. 1122.

To state in writing that the plaintiff is insane, or that her mind is affected, is libellous, if false.

Morgan v. *Lingen*, 8 L. T. 800.

It is libellous for the manager of a private lunatic asylum to write of a lady, "I have been to her house this morning and seen her. I think it my duty to inform you it is imperative that immediate steps to secure her should be taken."

Weldon v. *Winslow*, Times for March 14th-19th, 1884.

Ironical praise may be a libel; *e.g.*, calling an attorney "an honest lawyer."

Boydell v. *Jones*, 4 M. & W. 446; 7 Dowl. 210; 1 H. & H. 408.
R. v. *Brown*, 11 Mod. 86; Holt, 425.
Sir Baptist Hicks' Case, Hob. 215; Poph. 139.

An obituary notice of a living person may be a libel.

McBride v. *Ellis*, 9 Mich. 313.

It is libellous to impute to a Presbyterian "gross intolerance" in not allowing his hearse to be used at the funeral of his Roman Catholic servant.

Teacy v. *McKenna*, Ir. R. 4 C. L. 374.

[*22] It is *primâ facie* libellous to charge the plaintiff with ingratitude, even though the facts on which the charge is based be stated, and they do not bear it out.

Cox v. *Lee*, L. R. 4 Ex. 284; 38 L. J. Ex. 219.

It is libellous to state in a newspaper of a young nobleman that he drove over a lady and killed her and yet attended a public ball that very evening (although this only amounts to a charge of unfeeling conduct).

Churchill v. *Hunt*, 1 Chit. 480; 2 B. & A. 685.

It is libellous to write and publish of a lady of high rank that she has her photograph taken incessantly, morning, noon, and night, and receives a commission on the sale of such photographs.

R. v. *Rosenberg*, Times for Oct. 27th, 28th, 1879.

It is a libel to impute or imply that a grand jury have found a true bill against the plaintiff for any crime.

Harvey v. *French*, 1 Cr. & M. 11.

It is libellous to publish a highly coloured account of judicial proceedings, mixed with the reporter's own observations and conclusions upon what passed in Court, containing an insinuation that the plaintiff had committed perjury.

Stiles v. *Nokes*, 7 East, 493; same case *sub nomine Carr* v. *Jones*, 3 Smith, 491.

It is libellous to write and publish of the editor of a paper that he is "a con-

victed felon" and "a felon editor;" even although the fact is that he was convicted of felony, and underwent a term of imprisonment with hard labour.

Legman v. *Latimer and others*, 3 Ex. D. 15, 352; 46 L. J. Ex. 765; 47 L. J. Ex. 470; 25 W. R. 751; 26 W. R. 305; 37 L. T. 360, 819.

It is libellous to write about the plaintiff's "defalcations."

Bruton v. *Downes*, 1 F. & F. 668.

It is libellous to call a manufacturer a "truckmaster," for this implies that he has been guilty of practices in contravention of the Truck Act.

Homer v. *Taunton*, 5 H. & N. 661; 29 L. J. Ex. 318; 8 W. R. 499; 2 L. T. 512.

It is libellous to write and publish that a child is illegitimate.

Shelby v. *Sun Printing Association*, 38 Hun. (45 N. Y. Supr. Ct.) 474.

It is libellous to write and publish of a man that a certain notorious prostitute is "under his patronage or protection,"

More v. *Bennett* (1872), 48 N. Y. R. (3 Sickel), 472;

Or of a married man that his conduct towards his wife is so cruel that she was compelled to summon him before the magistrates.

Hakewell v. *Ingram*, 2 C. L. Rep. (1854), p. 1397.

It is libellous "to paint a man playing at cudgels with his wife."

Per Lord Holt, C.J., in *Anon.*, 11 Mod. 99.

See *Du Bost* v. *Beresford*, 2 Camp. 511.

It is a libel on a married lady to assert that her husband is petitioning for a divorce from her.

R. v. *Leng*, 34 J. P. 309.

It is a libel for a husband to publish in writing that A. has committed adultery with his wife.

Per Kelly, C.B., in *Brown* v. *Brine*, 1 Ex. D. 5; 45 L. J. Ex. 129; 24 W. R. 177; 33 L. T. 703.

It is libellous to charge in writing a man with having cheated at dice or on the [*23] turf, although all gambling and horse-racing transactions are illegal or at least void.

Greville v. *Chapman*, 5 Q. B. 731; 13 L. J. Q. B. 172; 8 Jur. 189; D. & M. 553.

Yrisarri v. *Clement*, 3 Bing. 432; 11 Moore, 308; 2 C. & P. 223.

It is libellous to call a man a "black-leg" or a "black-sheep." But there should be an averment that these words mean a person guilty of habitually cheating and defrauding others.

M'Gregor v. *Gregory*, 11 M. & W. 287; 12 L. J. Ex. 204; 2 Dowl. N. S. 769.

O'Brien v. *Clement*, 16 M. & W. 166; 16 L. J. Ex. 77.

And see *Barnett* v. *Allen*, 1 F. & F. 125; 27 L. J. Ex. 412; 4 Jur. N. S. 488; 3 H. & N. 376.

It is libellous to write and publish of the plaintiff the following words: "Digby has had a tolerable run of luck. He keeps a well-spread side-board, but I always consider myself in a family hotel when my legs are under his table, for the bill is sure to come in sooner or later, though I rarely dabble in the mysteries of écarté or any other game. The fellow is as deep as Crockford, and as knowing as the Marquis. I do dislike this leg-al profession."

Digby v. *Thompson and another*, 4 B. & Ad. 821; 1 N. & M. 485.

It is libellous to write and publish of a clergyman that he poisoned foxes on the estate of Sir M. S., in a fox-hunting county, and had been hung up in effigy in consequence of such "dastardly behaviour."

R. v. *Cooper*, 8 Q. B. 533; 15 L. J. Q. B. 206.

Foulger v. *Newcomb*, L. R. 2 Ex. 327; 36 L. J. Ex. 169; 15 W. R. 1181; 16 L. T. 595.

It is libellous to publish in a newspaper a story of the plaintiff calculated to make him ludicrous, though he had previously told the same story of himself.

Cook v. *Ward*, 6 Bing. 409; 4 M. & P. 99.

But it is not defamatory to write of another that he is "Man Friday."

Forbes v. *King*, 1 Dowl. 672; 2 L. J. Ex. 109.

For, as Lord Denman, C. J., observes in *Hoare* v. *Silverlock* (No. 1, 1848), 12 Q. B. 626; 17 L. J. Q. B. 308: "That imputed no crime at all. The 'Man

Friday,' we all know, was a very respectable man, although a black man, and black men have not been denounced as criminals yet." The law is otherwise in the United States.

King v. *Wood*, 1 N. & M. (South Car.) 184.

The Court of Exchequer Chamber thought the words "If Mrs. W. chooses to entertain the Duke of Brunswick she does what very few will do," a libel on the Duke.

Gregory v. *The Queen* (No. 1), 15 Q. B. 957; 15 Jur. 743; 5 Cox, C. C. 247.

Where the defendants posted up in a public club-room the following notice: "The Rev. J. Robinson and Mr. J. K., inhabitants of this town, not being persons that the proprietors and annual subscribers think it proper to associate with, are excluded this room;" this was held no libel; *sed quære*.

Robinson v. *Jermyn*, 1 Price, 11.

It is not libellous to publish in a newspaper that the plaintiff has sued his mother-in-law in the County Court.

Cox v. *Cooper*, 12 W. R. 75; 9 L. T. 329.

[*24] It is not libellous to send a circular to the members of a certain society, stating that the plaintiff's are not proper persons "to be proposed to be balloted for as members thereof."

Goldstein v. *Foss*, 6 B. & C, 154; (in Ex. Ch.) 4 Bing. 489; 2 C. & P. 252; 2 Y. & J. 146; 1 M. & P. 402.

It is not libellous to print and circulate a handbill, "B. Oakley, of Chillington, Game and Rabbit Destroyer, and his wife the seller of the same in country and town," unless it be averred and proved that the words imputed some illegal or improper slaughter or sale of game or rabbits.

R. v. *James Yates*, 12 Cox, C. C. 233.

It is not a libel to write and publish in the *Times*:—"We are requested to state that the honorary secretary of the Tichborne Defence Fund is not and never was a captain in the Royal Artillery as he has been erroneously described," for these words do not impute that the plaintiff had so represented himself.

Hunt v. *Goodlake*, 43 L. J. C. P. 54; 29 L. T. 472.

Defendant posted up several placards which ran thus:—"W. Gee, Solicitor, Bishop's Stortford. To be sold by auction, if not previously disposed of by private contract, a debt of the above, amounting to £3,197, due upon partnership and mortgage transactions." Bramwell, B., told the jury that in his opinion this was no libel, "because it was not libellous to publish of another that he owed money," and the jury returned a verdict of Not guilty.

R. v. *Coghlan*, 4 F. & F. 316.

It is not defamatory to write and publish of the plaintiff words implying that he endeavored to suppress dissension and discourage sedition in Ireland; for though such words might injure him in the minds of criminals and rebels, they would not tend to lower him in the estimation of right-thinking men.

Mawe v. *Pigott*, Ir. R. 4 C. L. 54.

And see *Clay* v. *Roberts*, 9 Jur. N. S. 580; 11 W. R. 649; 8 L. T. 397.

So a notice sent by a landlord to his tenants:—"Messrs. Henty & Sons hereby give notice that they will not receive in payment any cheques drawn on any of the branches of the Capital and Counties Bank," is not defamatory.

Capital and Counties Bank v. *Henty & Sons* (H. L.), 7 App. Cas. 741; 52 L. J. Q. B. 232; 31 W. R. 157; 47 L. T. 662; 47 J. P. 214.

The plaintiff was a certificated art master, and had been master at the Walsall Science and Art Institute. His engagement there ceased in June, 1874, and he then started, and became master of, another school which was called "The Walsall Government School of Art," and was opened in August. In September the following advertisement appeared in the *Walsall Observer*, signed by the defendants as chairman, treasurer, and secretary of the Institute respectively:—"Walsall Science and Art Institute. The public are informed that Mr. Mulligan's connection with the institute has ceased, and that he is not authorized to receive subscriptions on its behalf." *Held* that this was no libel; and

that no innuendo could make it so: for the words were not capable of a defamatory meaning.

Mulligan v. *Cole and others*, L. R. 10 Q. B. 549; 44 L. J. Q. B. 153; 33 L. T. 12.

[*25] If the words are not reasonably susceptible of any defamatory meaning, the judge at the trial will stop the case. But if the words are reasonably susceptible of two constructions, the one an innocent, the other a libellous construction, then it is a question for the jury which construction is the proper one (*Jenner and another* v. *A'Beckett*, L. R. 7 Q. B. 11; 41 L. J. Q. B. 14; 20 W. R. 181; 25 L. T. 464); and if the judge at the trial nonsuits, the Court will order a new trial. (*Hart and another* v. *Wall*, 2 C. P. D. 146; 46 L. J. C. P. 227; 25 W. R. 373.)

The jury should always read the alleged libel through before deciding that its effect is injurious. A word at the end may alter the whole meaning. (See *Hunt* v. *Algar*, 6 C. & P. 245, *post*, p. 99.) So if in one part appears something to the plaintiff's discredit, in another something to his credit, "the bane" and the "antidote" should be taken together. The jury should not dwell on isolated passages, but judge of the publication as a whole. (Per Lord Ellenborough, C.J., in *R.* v. *Lambert and Perry*, 2 Camp. 398; 31 How. St. Tr. 340; per Lord Kenyon, C.J., in *R.* v. *Reeves*, Peake, Add. Cas. 84; per Fitzgerald, J., in *R.* v. *Sullivan*, 11 Cox, C. C. 58.)

Illustration.

The report of a trial for libel contained some strong observations against the plaintiff, which were indeed a necessary part of the report, as the defendant had justified. At the end it was stated that the jury found a verdict for the plaintiff for £30. *Held*, that the publication, taken as a whole, was not injurious to the plaintiff.

Chalmers v. *Payne*, 2 C. M. & R. 156; 5 Tyrw. 766; 1 Gale, 69.

It is libellous to impute to any one holding an office that he has been guilty of improper conduct in that office, or has been actuated by wicked, corrupt, or selfish motives, or is incompetent for the post. So it is libellous to impute to a member of any of the learned professions that he does not possess the technical knowledge necessary for the proper practice of such profession, or that he has been guilty of professional misconduct. And it is not necessary [*26] (as it is in cases of slander, *post*, p. 66) that the person libelled should at the time still hold that office or exercise that profession: it is actionable to impute past misconduct when in office. (*Parmiter* v. *Coupland*, 6 M. & W. 108; *Boydell* v. *Jones*, 4 M. & W. 446; *Warman* v. *Hine*, 1 Jur. 820; *Goodburne* v. *Bowman*, 9 Bing. 532.)

In cases of slander there is a curious distinction drawn between offices of profit merely and offices of honour, such as that of justice of the peace; and it has been held that merely to impute incompetency or want of ability (as distinct from a want of integrity or impartiality) to a justice of the peace is not actionable, see p. 71. There is no authority, however, for supposing that an action of libel would not lie, if such words were printed and published.

Illustrations.

It is libellous to write and publish of a Protestant archbishop that he attempted to convert a Catholic priest by offers of money and of preferment in the Church of England and Ireland.

Archbishop of Tuam v. *Robeson and another*, 5 Bing, 17; 2 M. & P. 32.

It is libellous to write and publish of an ex-mayor and a justice of the peace that during his mayoralty he was guilty of partiality and corruption, and displayed ignorance of his duties; and this notwithstanding the public nature of the offices he held.

Parmiter v. *Coupland*, 6 M. & W. 105; 9 L. J. Ex. 202; 4 Jur. 701.

Goodburne v. *Bowman*, 9 Bing. 532.

It is libellous to write and publish of a clergyman that he came to the performance of divine service in a towering passion, and that his conduct is calculated to make infidels of his congregation.

Walker v. *Brogden*, 19 C. B. N. S. 65; 11 Jur. N. S. 671; 13 W. R. 809; 12 L. T. 495.

Gathercole v. *Miall*, 15 M. & W. 319; 15 L. J. Ex. 179; 10 Jur. 337.

But see *Kelly* v. *Tinling*, L. R. I. Q. B. 699; 35 L. J. Q. B. 231; 12 Jur. N. S. 940; 14 W. R. 51; 13 L. T. 255.

It is libellous to write and publish of a dissenting minister:—"A serious misunderstanding has recently taken place amongst the Independent Dissenters of Great Marlow and their pastor, in consequence of some personal invectives publicly thrown from the pulpit by the latter against a young lady of distinguished merit and spotless reputation. We understand, however, that the matter is to be taken up seriously.—*Bucks Chronicle.*"

Edwards v. *Bell and others*, 1 Bing. 403.

As to a Roman Catholic priest, see

Hearne v. *Stowell*, 12 A. & E. 719; 4 P. & D. 696; 6 Jur. 458.

The trustees of a charity can sue jointly for a libellous letter published in a newspaper imputing to them improper management of the charity funds.

Booth v. *Briscoe* (C. A.), 2 Q. B. D. 496; 25 W. R. 838.

[*27] It is libellous to charge an overseer of a parish with "oppressive conduct" towards the paupers.

Woodard v. *Dowsing*, 2 M. & Ry. 74.

A placard stating of a certain overseer that when out of office he advocated low rates, when in office he advocated high rates, and that the defendant would not trust him with £5 of his property, is a libel.

Cheese v. *Scales*, 10 M. & W. 488.

It is libellous to accuse a vestry clerk of having in any way misapplied the money of the parish.

May v. *Brown*, 3 B. & C. 113.

It is libellous to charge a guardian of the poor with having been during the preceding year "a great defaulter" in his account.

Warman v. *Hine*, 1 Jur. 820.

It is libellous to charge the clerk to the justices of a borough with corruption.

Blagg v. *Sturt*, 10 Q. B. 899; 16 L. J. Q. B. 39; 11 Jur. 101.

It is libellous to impute habitual drunkenness and neglect of his duties to a certificated master mariner.

Coxhead v. *Richards*, 2 C. B. 569; 15 L. J. C. P. 278; 10 Jur. 984.

Harwood v. *Green*, 3 C. & P. 141.

Irwin v. *Brandwood*, 2 H. & C. 960; 33 L. J. Ex. 257; 10 Jur. N. S. 370; 12 W. R. 438; 9 L. T. 772.

Hamon v. *Falle*, 4 App. Cas. 247; 48 L. J. P. C. 45.

Medical Men.

To advertise falsely that certain quack medicines were prepared by a physician of eminence is a libel upon such physician.

Clark v. *Freeman*, 11 Beav. 112; 17 L. J. Ch. 142; 12 Jur. 149.

It is libellous to describe a medical practitioner in print as "the Harley Street Quack, Physician Extraordinary to several ladies of distinction."

Long v. *Chubb*, 5 C. & P. 55.

Wells v. *Webber*, 2 F. & F. 715.

Hunter v. *Sharpe*, 4 F. & F. 983; 15 L. T. 421; 30 J. P. 149.

But it is no libel to write and publish of a physician that he has met homœopathists in consultation: although it be averred in the declaration that to do so would be a breach of professional etiquette.

Clay v. *Roberts*, 9 Jur. N. S. 580; 11 W. R. 649; 8 L. T. 397.

Barristers.

To write and publish falsely of a barrister that he edited the third edition of a law book is actionable, if the book is proved to be full of inaccuracies which would seriously prejudice the plaintiff's reputation.

Archbold v. *Sweet*, 1 Moo. & Rob. 162; 5 C. & P. 219.

To write and publish of a barrister that he is "a quack lawyer and a mountebank" and "an impostor," is actionable.

Wakley v. *Healey*, 7 C. B. 591; 18 L. J. C. P. 241.

Sir W. Garrow's Case, 3 Chit. Crim. L. 884.

[*28] It is libellous to compare the conduct of an attorney in a particular case to that of the celebrated firm of Quirk, Gammon & Snap in "Ten Thousand a Year."

Woodgate v. *Ridout*, 4 F. & F. 202.

A correct report in the *Observer* of certain legal proceedings was headed "Shameful conduct of an attorney." *Held*, that the heading was a libel, even though all that followed was protected.

Clement v. *Lewis*, 3 Br. & Bing. 297; 3 B. & Ald. 702; 7 Moore, 200.

An information was granted for these words written to the mayor of Richmond:—"I am sure you will not be persuaded from doing justice by any little arts of your town clerk, whose consummate malice and wickedness against me and my family will make him do anything, be it ever so vile."

R. v. *Waite*, 1 Wils 22.

Cory v. *Bond*, 2 F. & F. 241.

Words complained of:—"If you will be misled by an attorney, who only considers his own interest, you will have to repent it: you may think, when you have once ordered your attorney to write to Mr. Giles, he would not do any more without your further orders, but if you once set him about it, he will go to any length without further orders." *Held*, a libel on the attorney who had been employed to write to Mr. Giles.

Godson v. *Home*, 1 Br. & Bing. 7; 3 Moore, 223.

The libel complained of was headed—"How Lawyer B. treats his clients," followed by a report of a particular case in which one client of Lawyer B.'s had been badly treated. That particular case was proved to be correctly reported, but this was held insufficient to justify the heading, which implied that Lawyer B. *generally* treated his clients badly.

Bishop v. *Latimer*, 4 L. T. 775.

Libel complained of, that the plaintiff, a proctor, had three times been suspended from practice for extortion. Proof that he had once been so suspended was held insufficient.

Clarkson v. *Lawson*, 6 Bing. 266, 587; 3 M. & P. 605; 4 M. & P. 356.

Blake v. *Stevens and others*, 4 F. & F. 232; 11 L. T. 543.

It is libellous to impute to a solicitor "disgraceful conduct" in having at an election disclosed confidential communications made to him professionally.

Moore v. *Terrell and others*, 4 B. & Ad. 870; 1 N. & M. 559.

But it is not a libel to say of a solicitor that he was admitted in 1879, when he was admitted in 1869.

Raven v. *Stevens & Sons*, 3 Times L. R. 67.

Journalists.

It is a libellous to impute to the editor and proprietor of a newspaper that in advocating the sacred cause of the dissemination of Christianity among the Chinese he was an impostor, anxious only to put money into his own pocket by

extending the circulation of his paper; and that he had published a fictitious subscription list with a view to induce people to contribute.

Campbell v. *Spottiswoode*, 3 B. & S. 769; 32 L. J. Q. B. 185; 9 Jur. N. S. 1069; 11 W. R. 569; 8 L. T. 201.

It is libellous to call the editor of a newspaper "a libellous journalist."

Wakley v. *Cooke & Healey*, 4 Exch. 511; 19 L. J. Ex. 91.

[*29] It is libellous to write and publish that a newspaper has a separate page devoted to the advertisements of usurers and quack doctors, and that the editor takes respectable advertisements at a cheaper rate if the advertisers will consent to their appearing in that page.

Russell and another v. *Webster*, 23 W. R. 69.

It is not libellous for one newspaper to call another "the most vulgar, ignorant and scurrilous journal ever published in Great Brittain;" but it is libellous to add, "it is the lowest now in circulation; and we submit the fact to the consideration of advertisers;" for that affects the sale of the paper and the profits to be made by advertising.—(Lord Kenyon, C. J.)

Heriot v. *Stuart*, 1 Esp. 437.

Any written words are libellous which impeach the credit of any merchant or trader by imputing to him bankruptcy, insolvency, or even embarrassment, either past, present, or future, or which impute to him fraud or dishonesty or any mean and dishonourable trickery in the conduct of his business, or which in any other manner are prejudicial to him in the way of his employment or trade.

"The law has always been very tender of the reputation of tradesmen, and therefore words spoken of them in the way of their trade will bear an action that will not be actionable in the case of another person, and if bare words are so, it will be stronger in the case of a libel in the public newspaper, which is so diffusive." (*Per curiam* in *Harman* v. *Delany*, 2 Str. 898; 1 Barnard, 289; Fitz. 121.)

Illustrations.

The printers of a newspaper, by a mistake in setting up in type the announcements from the *London Gazette*, placed the name of the plaintiff's firm under the heading "First Meeting under the Bankruptcy Act" instead of under "Dissolutions of Partnership." An ample apology was inserted in the next issue: no damage was proved to have followed to the plaintiff: and there was no suggestion of any malice. In an action for libel against the proprietors of the paper, the jury awarded the plaintiff £50 damages. *Held* that the publication was libellous, and that the damages awarded were not excessive.

Shepheard v. *Whitaker*, L. R. 10 C. P. 502; 32 L. T. 402.

[N. B.—The chief clerk thought £10 sufficient in a very similar case, *Stubbs* v. *Marsh*, 15 L. T. 312.]

It is libellous to advertise that a certain optician is "a licensed hawker" and "a quack in spectacle secrets."

Keyzor and another v. *Newcomb*, 1 F. & F. 559.

[*30] It is a libel to write and publish of a licensed victualler that his licence has been refused; as it suggests that he had committed some breach of the licensing laws.

Bignell v. *Buzzard*, 3 H. & N. 217; 27 L. J. Ex. 355.

It is libellous to write and publish of the plaintiff that he regularly or purposely supplied bad and unwholesome water to ships, whereby the passengers were made ill.

Solomon v. *Lawson*, 8 Q. B. 823; 15 L. J. Q. B. 253; 10 Jur. 796.

Barnard v. *Salter*, W. N. 1872, p. 140.

But for one tradesman merely to puff up his own goods, and decry those of his rival, is no libel; unless fraud or dishonesty be imputed.

Evans v. *Harlow*, 5 Q. B. 624; 13 L. J. Q. B. 120; 8 Jur. 571; D. & M. 507.

Heriot v. *Stuart*, 1 Esp. 437, *ante*, p. 29.

Partners may sue jointly for a libel defamatory of the partnership.

Le Fanu v. *Malcolmson*, 1 H. L. C. 637 ; 8 Ir. L. R. 418.

Haythorn v. *Lawson*, 3 C. & P. 196.

Ward v. *Smith*, 6 Bing. 749 ; 4 C. & P. 302 ; 4 M. & P. 595.

So a company or corporation can sue even one of their own members for a libel relating to their management of their business.

Williams v. *Beaumont*, 10 Bing. 260 ; 3 Moore & Sc. 705.

Metropolitan Omnibus Co. v. *Hawkins*, 4 H. & N. 87 ; 28 L. J. Ex. 201 : 5 Jur. N. S. 226; 7 W. R. 265 ; 32 L. T. (Old S.) 281.

A married woman trading under her own name may sue as a trader, without joining her husband, for a libel on her in the way of her trade.

Per Brett, J., in *Summers* v. *City Bank*, L. R. 9 C. P. 583 ; 43 L.J. C. P. 261.

And now see 45 & 46 Vict. c. 75, s. 1, *post*, pp. 395, 396.

Sometimes also an attack upon a thing may be defamatory of the owner of that thing, or of others immediately connected with it. But this is only so where an attack upon the thing is also an indirect attack upon the individual. If the words do not touch the personal character or professional conduct of the individual, they are not defamatory of *him*, and no action lies (unless the words fall within the rules relating to *Slander of Title ;* see post, c. V.). But to impute that the goods which the plaintiff sells or manufactures are adulterated to his knowledge is a distinct charge against the plaintiff of fraud and dishonesty in his trade.

Illustrations.

A declaration alleged that the plaintiffs were manufacturers of bags, and had manufactured a bag which they called the "Bag of Bags," and that the [*31] defendant printed and published, concerning the plaintiffs in the way of their business, the words following :—"As we have not seen the Bag of Bags, we cannot say that it is useful, or that it is portable, or that it is elegant. All these it may be, but the only point we can deal with is the title, which we think very silly, very slangy, and very vulgar : and which has been forced upon the notice of the public *ad nauseam*." On demurrer, Lush, J., held that the words could not be deemed libellous, either upon the plaintiffs or upon their mode of conducting their business. But Mellor and Hannem, JJ., thought that it was a question for the jury whether the words went beyond the limits of fair criticism, and whether or not they were intended to disparage the plaintiffs in the conduct of their business.

Jenner and another v. *A'Beckett*, L. R. 7 Q. B. 11 ; 41 L. J. Q. B. 14 ; 20 W. R. 181 ; 25 L. T. 464.

The defendant published an advertisement in these words :—"Whereas, there was an account in the *Craftsman* of John Harman, gunsmith, making guns of two feet six inches to exceed any made by others of a foot longer (with whom it is supposed he is in fee), this is to advise all gentlemen to be cautious, the said gunsmith *not daring to engage with any artist in town*, nor ever did make such an experiment (except out of a leather gun), as any gentleman may be satisfied of at the Cross Guns in Longacre." *Held* a libel on the plaintiff in the way of his trade. Verdict for the plaintiff. Damages £50.

Harman v. *Delaney*, 2 Stra. 898 ; 1 Barnard. 289, 438 ; Fitz. 121.

A declaration alleged that the plaintiff carried on the trade of an engineer, and sold in the way of his trade goods called "self-acting tallow syphons or lubricators," and that the defendant published of the plaintiff in his said trade and as such inventor, as follows :—"This is to caution parties employing steam power from a person, offering what he calls self-acting tallow syphons or lubricators, stating that he is the sole inventor, manufacturer and patentee, thereby monopolizing high prices at the expense of the public. R. Harlow (the de-

fendant) takes this opportunity of saying that such a patent does not exist, and that he has to offer an improved lubricator, which dispenses with the necessity of using more than one to a steam engine, thereby constituting a saving of 50 per cent. over every other kind yet offered to the public. Those who have already adopted the lubricators against which R. H. would caution, will find that the tallow is wasted instead of being effectually employed as professed." *Held* no libel on the plaintiff, either generally or in the way of his trade, but only a libel on the lubricators, and therefore not actionable without proof of special damage.

Evans v. *Harlow*, 5 Q. B. 624; 13 L. J. Q. B. 120; 8 Jur. 571; D. & M. 507.

So where one tradesman merely asserts that his own goods are superior to those of some other tradesman, no action lies unless the words be published falsely and maliciously and special damage has ensued.

Young and others v. *Macrae*, 3 B. & S. 264; 32 L. J. Q. B. 6; 11 W. R. 63; 9 Jur. N. S. 539; 7 L. T. 354.

Western Counties Manure Co. v. *Lawes Chemical Manure Co.*, L. R. 9 Ex. 218; 43 L. J. Ex. 171; 23 W. R. 5.

A libel on the management of a newspaper is a libel on its proprietors, jointly, in the way of their trade, and therefore actionable without special damage.

Russell and another v. *Webster*, 23 W. R. 59.

[*32] To write and publish that a ship is unseaworthy may be a libel on its owner. "It is like saying of an innkeeper that his wine or his tea is poisoned."

Ingram v. *Lawson*, 6 Bing. N. C. 212; 8 Sc. 471, 478; 4. Jur. 151; 9 C. & P. 326.

To advertise falsely that certain quack medicines were prepared by an eminent physician, is a libel upon such physician.

Clark v. *Freeman*, 11 Beav. 112; 17 L. J. Ch. 142; 12 Jur. 149.

It is libellous falsely to impute to a bookseller that he publishes immoral or absurd poems.

Tabart v. *Tipper*, 1 Camp. 350.

It is libellous falsely to write and publish of professional vocalists that they had advertised themselves to sing at certain music-halls songs which they had no right to sing in public.

Hart and another v. *Wall*, 2 C. P. D. 146; 46 L. J. C. P. 227; 25 W. R. 373.

But comments, however severe, on the advertisements or handbills of a tradesman, will not be libellous, if the jury find that they are fair and temperate comments, not wholly undeserved, on a matter to which the public attention was expressly invited by the plaintiff.

Paris v. *Levy*, 9 C. B. N. S. 342; 30 L. J. C. P. 11; 9 W. R. 71; 3 L. T. 324; 2 F. & F. 71.

Morrison and another v. *Harmer and another*, 3 Bing. N. C. 759; 4 Scott, 524; 3 Hodges, 108.

Fair and bonâ fide comment.

Every one has a right to comment on matters of public interest and general concern, provided he does so fairly and with an honest purpose. Such comments are not libellous, however severe in their terms, unless they are written intemperately and maliciously. Every citizen has full freedom of speech on such subjects, but he must not abuse it.

This branch of the law is of but recent growth. Cockburn, C. J., says in *Wason* v. *Walter*, L. R. 4 Q. B. 93, 94:—

"Our law of libel has, in many respects, only gradually developed itself into anything like a satisfactory and settled form. The full liberty of public writers to comment on the conduct and motives of public men has only in very recent times been recognised. Comments on government, on ministers and officers of state, on

members of both Houses of Parliament, on judges and other public functionaries, are now made every day, which half a century ago would have been the subject of actions or *ex officio* informations, and would have brought down fine and imprisonment on publishers and authors. Yet [*33] who can doubt that the public are gainers by the change, and that, though injustice may often be done, and though public men may often have to smart under the keen sense of wrong inflicted by hostile criticism, the nation profits by public opinion being thus freely brought to bear on the discharge of public duties?"

It has often been said by learned judges that fair and honest criticism in matters of public concern is "*privileged*." See especially *Henwood* v. *Harrison*, L. R. 7 C. P. 606 ; 41 L. J. C. P. 206 ; 20 W. R. 1000 ; 26 L. T. 938. But this does not mean that such words are "privileged by reason of the occasion" in the strict legal sense of that term. The defence really is, that the words are not defamatory, that criticism is no libel. This is very clearly pointed out by Blackburn, J., in *Campbell* v. *Spottiswoode*, 3 B. & S. 769 ; 32 L. J. Q. B. 185 ; 9 Jur. N. S. 1069 ; 11 W. R. 569 ; 8 L. T. 201. If such criticism was privileged in the strict sense of the word, it would in every case be necessary for the plaintiff to prove actual malice, however false and however injurious the strictures may have been ; while the defendant would only have to prove that he honestly believed the charges himself in order to escape all liability ; and this clearly is not the law. See *Williams* v. *Spowers and others*, Australian Law Times, May 13th, 1882, p. 113 ; and 3 Times L. R. 432.

Illustration.

Condemnation of the foreign policy of the Government, however sweeping, is no libel.

Animadversions, however severe, on the use made by the vestry of the money of the ratepayers, is not libellous, unless corruption or embezzlement be imputed to individual vestrymen.

Criticism, however trenchant, on any new poem or novel, or on any picture exhibited in a public gallery, is no libel.

But to maliciously pry into the private life of any poet, novelist, artist, or statesman, is indefensible.

Criticism.

True criticism differs from defamation in the following particulars :—

1. Criticism deals only with such things as invite public attention, or call for public comment. It does not follow a public man into his private life, or pry into his domestic concerns.

2. Criticism never attacks the individual, but only his [*34] *work*. Such work may be either the policy of a government, the action of a member of Parliament, a public entertainment, a book published, or a picture exhibited. In every case the attack is on a man's *acts*, or on some *thing*, and not upon the man himself. A true critic never indulges in personalities, but confines himself to the merits of the subject-matter.

3. True criticism never imputes or insinuates dishonourable motives (unless justice absolutely requires it, and then only on the clearest proofs).

4. The critic never takes advantage of the occasion to gratify private malice, or to attain any other object beyond the fair discussion of matters of public interest, and the judicious guidance of the public taste. He will carefully examine the production before him, and then honestly and fearlessly state his true opinion of it.

Every one has a right to publish such fair and candid criticism, even "although the author may suffer loss from it. Such a loss the law does not consider as an injury, because it is a loss which the party ought to sustain. It is, in short, the loss of fame and profits to which he was never entitled." * * * "Reflection upon personal character is another thing. Show me an attack upon the moral character of the plaintiff, or any attack upon his character unconnected with his authorship, and I should be as ready as any judge who ever sat here to protect him. But I cannot hear of malice on account of turning his works into ridicule." (Per Lord Ellenborough in the celebrated case of *Sir John Carr* v. *Hood*, 1 Camp. 355, n.) So in *Tabart* v. *Tipper*, 1 Camp. 351, the same learned Judge says: "Liberty of criticism must be allowed, or we should neither have purity of taste nor of morals. Fair discussion is essentially necessary to the truth of history and the advancement of science. That publication, therefore, I shall never consider as a libel, which has for its object, not to injure the reputation of any individual, but to correct misrepresentations of fact, to refute sophistical reasoning, to expose a vicious taste in literature, or to censure what is hostile to morality." "A critic must confine himself to criticism, and not make it the veil for personal censure, nor allow himself to run into reckless and unfair attacks merely from the love of exercising his power of [*35] denunciation." (Per Huddleston, B., in *Whistler* v. *Ruskin*, *Times* for Nov. 27th, 1878).

The right to comment upon the public acts of public men is the right of every citizen, and is not the peculiar privilege of the press. *Kane* v. *Mulvany*, Ir. R. 2 C. L. 402.) But newspaper writers, though in strict law they stand in no better position than any other person, are generally allowed greater latitude by juries. For it is in some measure the duty of the press to watch narrowly the conduct of all government officials, and the working of all public institutions, to comment freely on all matters of general concern to the nation, and to fearlessly expose abuses.

Comment and criticism on matters of public interest stand on a different footing from reports of judicial or Parliamentary proceedings. Such reports are privileged, so long as they are fair and accurate *reports* and nothing more. But so soon as there is any attempt at comment, the privilege is lost. In short, report and comment are two distinct and separate things. A report is the mechanical reproduction, more or less condensed or abridged, of

what actually took place ; comment is the judgment passed on the circumstances reported, by one who has applied his mind to them. Fair reports are privileged, while fair comments, if on matters of public interest, are no libels at all.

Comment on well-known or admitted facts is a very different thing from the assertion of unsubstantiated facts for comment. "That a fair and *bonâ fide* comment on a matter of public interest is an excuse of what would otherwise be a defamatory publication is admitted. The very statement, however, of this rule assumes the matters of fact commented upon to be somehow or other ascertained. It does not mean that a man may invent facts, and comment on the facts so invented in what would be a fair and *bonâ fide* manner on the supposition that the facts were true. . . . If the facts as a comment upon which the publication is [* 36] sought to be excused do not exist, the foundation of the plea fails." (*Per cur.* in *Lefroy* v. *Burnside* (No. 2), 4 L. R. Ir. at pp. 565, 566.) "There is no doubt that the public acts of a public man may lawfully be made the subject of fair comment or criticism not only by the press, but by all members of the public. But the distinction cannot be too clearly borne in mind between comment or criticism and allegations of fact, such as that disgraceful acts have been committed, or discreditable language used. It is one thing to comment upon or criticise, even with severity, the acknowledged or proved acts of a public man, and quite another to assert that he has been guilty of particular acts of misconduct." (*Per cur.* in *Davis & Sons* v. *Shepstone*, 11 App. Cas. at p. 190 ; 55 L. J. P. C. 51 ; 55 L. T. at p. 2 ; 34 W. R. 722.) To state facts which are libellous is not comment or criticism on anything. (Per Field, J., in *R.* v. *Flowers*, 44 J. P. 377.) The facts which give rise to the comments must be proved substantially as alleged.

Slight unintentional errors, however, will be excused. If a writer in the course of temperate and legitimate criticism falls into error as to some detail, or draws an incorrect inference from the facts before him, and thus goes beyond the limits of strict truth, such inaccuracies will not cause judgment to go against him, if the jury are satisfied, after reading the whole publication, that it was written honestly, fairly, and with regard to what truth and justice require. "It is not to be expected that a public journalist will always be infallible." (Per Cockburn, C. J., 4 F. & F. 217.)

Illustrations.

A newspaper may comment upon the hearing of a charge of felony and the evidences produced thereat, and discuss the conduct of the magistrates in dismissing the charge without hearing the whole of the evidence ; but it may not proceed to disclose "evidence which might have been adduced" and thus argue from facts not in evidence before the magistrates that the accused was really guilty of the felony. Verdict for the plaintiff. Damages £25.

Hibbins v. *Lee*, 4 F. & F. 243 ; 11 L. T. 541.

And see *Helsham* v. *Blackwood*, 11 C. B. 111 ; 20 L. J. C. P. 187 ; 15 Jur. 861.

R. v. *White and another*, 1 Camp. 359.

A writer in a newspaper may comment on the fact that corrupt practices

[* 37] extensively prevailed at a parliamentary election ; but may not give the names of individuals as guilty of bribery, unless he can prove the truth of the charge to the letter.

Wilson v. *Reed and others*, 2 F. & F. 149.

Dickeson v. *Hilliard and another*, L. R. 9 Ex. 79 ; 43 L. J. Ex. 37 ; 22 W. R. 372 ; 30 L. T. 196.

A newspaper reported that the mother of a lady, who was dead and buried, had applied to the coroner on affidavits for an order that the body might be exhumed, and then proceeded to give a long sensational narrative of shocking acts of cruelty to the deceased committed by her husband, imputing that he had caused her death. This narrative commenced with the words—"From inquiries made by our reporter it appears that the deceased," &c. As a matter of fact the reporter had made no inquiries ; he had merely read the affidavits, and accepted the *ex parte* statements contained in them as truth : they were in fact wholly false. He was convicted and fined £50.

R. v. *Andrew Gray*, 26 J. P. 663.

A Dublin newspaper asserted that the plaintiff, who was the manager of the Queen's Printing Office in Ireland, had corruptly supplied *Freeman's Journal* with official information and surreptitious copies of official documents. A plea of fair comment, stating that *Freeman's Journal* did somehow get official information earlier than other papers, and that defendant *bonâ fide* believed that such information could only have been obtained from the Queen's Printing Office, was held bad on demurrer.

Lefroy v. *Burnside*, (No. 2), 4 L. R. Ir. 557.

Defendant wrote "A History of New Zealand," and therein stated that the plaintiff, a lieutenant in the Kai Jwi cavalry, had charged at some women and young children who were harmlessly hunting pigs, "and cut them down gleefully and with ease" ; that he had dismissed from the service a subordinate officer who had protested against this cruelty, and that he was ever afterwards known among the Maoris by the nickname "Kohuru" (the murderer). Defendant admitted that these facts did not appear in the official reports, or in any other history of New Zealand ; but he said he had heard rumours to the effect, and he called a witness who had made a statement to the Governor of New Zealand on hearsay evidence, containing substantially the same charge, a copy of which statement the Governor had forwarded to the defendant. Huddleston, B., directed the jury that it was no defence whatever that the charges were made in the *bonâ fide* belief that they were true, and without any malice towards the plaintiff. Verdict for the plaintiff. Damages £5,000.

Bryce v. *Rusden*, 2 Times L. R. 435.

Brenon v. *Ridgway*, 3 Times L. R. 592.

The appellants were the owners of a daily newspaper called the *Natal Witness*, in which they constantly attacked the official conduct of the respondent, the British Resident Commissioner in Zululand, asserting that he had himself violently assaulted a Zulu chief, that he had set on his native police to assault and abuse others, &c. They vouched for the truth of these stories, declaring that though some doubt had been thrown on them, they would prove to be true on investigation. They then proceeded, on the assumption that the charges were true, to comment on the respondent's conduct in most offensive and injurious language. At the trial in Natal, on September 4th, 1883, it was proved that the charges against the respondent were absolutely without foundation : the [* 38] appellants made no attempt to support them by evidence. Verdict for the plaintiff. Damages £500. Motion for a new trial refused by the Supreme Court of Natal. *Held*, on appeal to the Judicial Committee of the Privy Council that the distinction must be closely drawn between comment or criticism and allegations of fact ; that such a publication was in no way privileged, and that the damages were not excessive.

Davis & Sons v. *Shepstone*, 11 App. Cas. 187 ; 55 L. J. P. C. 51 ; 34 W. R. 722 ; 55 L. T. 1 ; 50 J. P. 709.

Walker v. *Brogden*, 19 C. B. N. S. 65 ; 11 Jur. N. S. 671 ; 13 W. R. 809 ; 12 L. T. 495.

Duplany v. *Davis*, 3 Times L. R. 184.

Bona fides.

But all comments must be fair and honest. Matters of public interest must be discussed temperately. Wicked and corrupt motives should never be wantonly assigned. And it will be no defence that the writer, at the time he wrote, honestly believed in the truth of the charges he was making, if such charges be made recklessly, unreasonably, and without any foundation in fact. *Campbell* v. *Spottiswoode*, 3 F. & F. 421 ; 3 B. & S. 769 ; 32 L. J. Q. B. 185 ; 11 W. R. 569 ; 9 Jur. N. S. 1,039 ; 8 L. T. 291). Some people are very credulous, especially in politics, and can readily believe any evil of their opponents. There must, therefore, be some foundation in fact for the charges made ; the writer must bring to his task some degree of moderation and judgment.

So long as a writer confines himself to discussing the public conduct of public men, the mere fact that motives have been unjustly assigned for such conduct is not of itself sufficient to destroy this defence, though of course it will tell strongly in favour of the plaintiff. "A line must be drawn," says Cockburn, C. J., in *Campbell* v. *Spottiswoode*, 3 B. & S. 776, 777 ; 32 L. J. Q. B. 199 ; 8 L. T. 201, "between criticism upon public conduct and the imputation of motives by which that conduct may be supposed to be actuated; one man has no right to impute to another, whose conduct may be fairly open to ridicule or disapprobation, base, sordid, and wicked motives, unless there is so much ground for the imputation that a jury shall find, not only that he had an honest belief in the truth of his statements, but that [*39] his belief was not without foundation" "I think the fair position in which the law may be settled is this : That where the public conduct of a public man is open to animadversion, and the writer who is commenting upon it makes imputations on his motives, which arise fairly and legitimately out of his conduct, so that a jury shall say that the criticism was not only honest but also well-founded, an action is not maintainable. But it is not because a public writer fancies that the conduct of a public man is open to the suspicion of dishonesty, he is therefore justified in assailing his character as dishonest."

Illustrations.

An article in the *Saturday Review* imputed to the plaintiff, the editor and part proprietor of the *British Ensign*, that in advocating the propagation of Christianity among the Chinese his purpose was merely to increase the circulation of his own paper, and so put money into his own pocket : that he was an impostor, and that he put forth a list of fictitious subscribers in order to delude others into subscribing. The jury found that the writer honestly believed the imputations contained in the article to be well-founded, but the Court held that the limits of fair criticism had been undoubtedly exceeded.

Campbell v. *Spottiswoode*, 3 F. & F. 421 ; 32 L. J. Q. B. 185 ; 3 B. & S. 769 ; 9 Jur. N. S. 1069 ; 11 W. R. 569 ; 8 L. T. 201.

Two sureties were proposed for the Berwick election petition : neither of whom had any connection with the borough. Affidavits were put in to show that one of them was an insufficient surety, being embarrassed in his affairs. The *Times* set out these affidavits and added the remarks : "But why, it may be asked, does this cockney tailor take all this trouble, and subject himself to all this exposure of his difficulties and embarrassments ? He has nothing to do

with the borough of Berwick-upon-Tweed or its members. How comes it then that he should take so much interest in the job? There can be but one answer to these very natural and reasonable queries: *he is hired for the occasion*. The affair in fact is a foul job throughout, and it is only by such aid that it can possibly be supported." In an action brought on the whole article, the defendant pleaded that the publication was a correct report of certain legal proceedings, "together with a fair and *bonâ fide* commentary thereon." But the jury thought the comment was not fair and gave the plaintiff damages £100.

Cooper v. *Lawson*, 8 A. & E. 746; 1 P. & D. 15; 1 W. W. & H. 601; 2 Jur. 919.

The plaintiff, who was a Q. C. and a Member of Parliament, was appointed recorder of Newcastle. The defendant's paper, the *Law Magazine and Review*, thereupon discussed the desirability of giving such an appointment to a member of the House of Commons, and declared that it was a reward for his having steadily voted with his party. Cockburn, C. J., directed the jury that a public writer was fairly entitled to comment on the distribution of Government patronage; but that he was not entitled to assert that there had been a corrupt promise [*40] or understanding that the plaintiff would be thus rewarded, if he always voted according to order. Verdict for the plaintiff; damages 40*s*.

Seymour v. *Butterworth*, 3 F. & F. 372.

The plaintiff was ex-mayor of Winchester. The *Hampshire Advertiser* imputed to him partiality and corruption and ignorance of his duties as mayor and justice of the peace for the borough. *Held*, that though some words which are clearly libellous of a private person may not amount to a libel when spoken of a person holding a public capacity, still any imputation of unjust or corrupt motives is equally libellous in either case.

Parmiter v. *Coupland*, 6 M. & W. 105; 9 L. J. Ex. 202; 4 Jur. 701.

But when an attack is made on the policy of her Majesty's Government or on the public conduct of any high officer of State, it appears now that wicked, or at least selfish, motives *may* be imputed, so long as they are not recklessly and maliciously imputed.

Per Martin, B., in *Harle* v. *Catherall*, 14 L. T. 801.

Per Cockburn, C. J., in *Wason* v. *Walter*, L. R. 4 Q. B. 93; 38 L. J. Q. B. 34; 17 W. R. 169; 19 L. T. 416; 8 B. & S. 730.

And in *Campbell* v. *Spottiswoode*, *ante*, p. 38.

The defendants, the printers and publishers of the *Manchester Courier*, published in their paper a report of the proceedings at a meeting of the board of guardians for the Altrincham Poor-Law Union, at which charges were made against the the medical officer of the union workhouse at Knutsford, of neglecting to attend the pauper patients when sent for. Such charges proved to be utterly unfounded; they were made in the absence of the medical officer, without any notice having been given him. *Held*, that the matter was one of public interest; but that the report was not privileged by the occasion, although it was admitted to be a correct account of what passed at the meeting; that it was obviously unfair to the plaintiff that such *ex parte* statements should be published in the local papers; that the editor should therefore have exercised his discretion and excluded the report altogether; and the plaintiff recovered 40*s*. damages and costs.

Purcell v. *Sowler* (C. A.), 2 C. P. D. 215; 46 L. J. C. P. 303; 25 W. R. 362; 36 L. T. 416.

What are matters of public interest?

The public conduct of every public man is a matter of public concern:—

"A clergyman with his flock, an admiral with his fleet, a general with his army, and a judge with his jury, are all subjects of public discussion. Whoever fills a public position renders himself open thereto. He must accept an attack as a necessary, though unpleasant, appendage to his office." (Per Bramwell, B., in *Kelly* v. *Sherlock*, L. R. 1 Q. B. 689; 35 L. J. Q. B. 209; 12 Jur. N. S. 937.)

All political, legal and ecclesiastical matters therefore [* 41] are matters of public concern. So is the conduct of every vestry, town council, board of guardians, &c. For, although these may be matters of *local* interest principally, still this rule applies, so long as they are not *private* matters. Any thing that is a public concern to the inhabitants of Birmingham or Manchester is a matter of public interest within the meaning of the rule. See the remarks of Cockburn, C. J., in *Cox* v. *Feeney*, 4 F. & F. 13. And again in *Purcell* v. *Sowler*, 2 C. P. D. 218, the same learned judge says: "But it seems to me that whatever is matter of public concern when administered in one of the government departments, is matter of public concern when administered by the subordinate authorities of a particular district. It is one of the characteristic features of the government of this country that, instead of being centralized, many important branches of it are committed to the conduct of local authorities. Thus, the business of counties, and that of cities and boroughs, is, to a great extent, conducted by local and municipal government. It is not, therefore, because the matter under consideration is one which in its immediate consequences affects only a particular neighborhood that it is not a matter of public concern. The management of the poor and the administration of the poor-law in each local district are matters of public interest. In this management the medical attendance on the poor is matter of infinite moment, and consequently the conduct of a medical officer of the district may be of the greatest importance in that particular district, and so may concern the public in general."

Matters of public interest may be conveniently grouped under the following heads :—

1. Affairs of state ;
2. The administration of justice ;
3. Public institutions and local authorities ;
4. Ecclesiastical matters ;
5. Books, pictures, and architecture ;

[*42] 6. Theatres, concerts, and other public entertainments ;

7. Other appeals to the public.

Lord Coleridge, C. J., decided in *Weldon* v. *Johnson*, *Times* for May 27th, 1884, that it was a question for the judge and not for the jury, whether a particular topic was or was not a matter of public interest.

1. *Affairs of State.*

The conduct of all public servants, the policy of the Government, our relations with foreign countries, all suggestions of reforms in the existing laws, all bills before Parliament, the adjustment and collection of taxes, and all other matters which touch the public welfare, are clearly matters of public interest, which come within the preceding rule. "Every subject has a right to comment on those acts of public men which concern him as a subject of the realm, if he do not make his commentary a cloak for malice and slander." (Per Parke, B., in *Parmiter* v. *Coupland*, 6 M & W.

108.) Those who fill "a public position must not be too thin-skinned in reference to comments made upon them. It would often happen that observations would be made upon public men which they knew from the bottom of their hearts were undeserved and unjust; yet they must bear with them, and submit to be misunderstood for a time, because all knew that the criticism of the press was the best security for the proper discharge of public duties." (Per Cockburn, C. J., in *Seymour* v. *Butterworth*, 3 F. & F. 376, 377; and see the *dicta* of the judges in *R.* v. *Sir R. Carden*, 5 Q. B. D. 1; 49 L. J. (M. C.) 1; 28 W. R. 133; 41 L. T. 504.)

Illustrations.

The presentation of a petition to Parliament impugning the character of one of her Majesty's judges, and praying for an inquiry, and for his removal from office should the charge prove true, is a matter of high public concern, on [*43] which all newspapers may comment, and in severe terms. So is the debate in the House on the subject of such petition.

Wason v. *Walter*, L. R. 4 Q. B. 73; 38 L. J. Q. B. 34; 17 W. R. 169; 19 L. T. 409; 8 B. & S. 730.

The presentation of a petition to Parliament against quack doctors is matter for public comment.

Dunne v. *Anderson*, 3 Bing. 88; Ry. & Moo. 287; 10 Moore, 407.

Evidence given before a Royal Commission is matter *publici juris*, and everyone has a perfect right to criticise it.

Per Wickens, V.-C., in *Mulkern* v. *Ward*, L. R. 13 Eq. 622; 41 L. J. Ch. 464; 26 L. T. 831.

So is evidence taken before a Parliamentary Committee on a local gas bill.

Hedley v. *Barlow*, 4 F. & F. 224.

A report of the Board of Admiralty upon the plans of a naval architect, submitted to the Lords of the Admiralty for their consideration, is a matter of national interest.

Henwood v. *Harrison*, L. R. 7 C. P. 606; 41 L. J. C. P. 206; 20 W. R. 1000; 26 L. T. 938.

The appointment of a Roman Catholic to be Calendarer of State Papers is a matter of public concern.

Turnbull v. *Bird*, 2 F. & F. 508.

Lefroy v. *Burnside* (No. 2), 4 L. R. Ir. 556.

All appointments by the Government to any office are matters of public concern.

Seymour v. *Butterworth*, 3 F. & F. 372.

A newspaper is entitled to comment on the fact (if it be one) that corrupt practices extensively prevailed at a recent Parliamentary election so long as it does not make charges against individuals.

Wilson v. *Reed and others*, 2 F. & F. 149.

A meeting assembled to hear a political address by a candidate at a Parliamentary election, and the conduct thereat of all persons who take any part in such meeting, are fair subjects for *bonâ fide* discussion by a writer in a public newspaper.

Davis v. *Duncan*, L. R. 9 C. P. 396; 43 L. J. C. P. 185; 22 W. R. 575; 30 L. T. 464.

The public career of any member of Parliament, or of any candidate for Parliament, is of course a matter of public interest in the constituency. But not his private life and history, "However large the privilege of electors may be," said Lord Denman, C. J., "it is extravagant to suppose that it can justify the publication to all the world of facts injurious to a person who happens to stand in the situation of a candidate."

Duncombe v. *Daniell*, 8 C. & P. 222; 2 Jur., 32; 1 W. W. & H. 101.

I apprehend, however, that the electors are entitled to investigate and discuss all matters in the past private life of a candidate which, if true, would prove

him morally or intellectually unfit to represent them in Parliament; but not to circulate unfounded charges against him even *bonâ fide*.

Harwood v. *Sir J. Astley*, 1 B. & P. N. R. 47.
Wisdom v. *Brown*, 1 Times, L. R. 412.
Pankhurst v. *Hamilton*, 3 Times L. R. 500.

[*44] In America the law on this point varies greatly in the different States. In New York no attack is allowed even on the public character of any public officer; and that the defendant honestly believed in the truth of the charge is no defence. No distinction is made between a public man and a private citizen.

Hamilton v. *Eno*, 81 N. Y. 116.
Lewis v. *Few*, 5 Johns 1.
Root v. *King*, 7 Cowen, 613; 4 Wend. 113.

So in West Virginia.

Sweeney v. *Baker*, 13 West Virginia R. 158.

And in Massachusetts.

Commonwealth v. *Clap*, 4 Mass. 103.
Curtis v. *Mussey*, 6 Gray (72 Mass.), 261.

In Michigan, the Supreme Court decided that "the public are interested in knowing the character of candidates for Congress, and while no one can lawfully destroy the reputation of a candidate by falsehood, yet, if an honest mistake is made in an honest attempt to enlighten the public, it must reduce the damages to a minimum if the fault itself is not serious."

Bailey v. *Kalamazoo Publishing Co.*, 40 Mich. 251.
Scripps v. *Foster*, 39 Mich. 376; 41 Mich. 742.

In New Hampshire, a newspaper may state in good faith and on reasonable grounds that any public officer has been guilty of official misconduct.

Palmer v. *Concord*, 48 N. H. 211.

And in Iowa charges affecting the *moral* character of any public man are protected if made in good faith and on reasonable grounds.

Mott v. *Dawson*, 46 Iowa, 533.

2. *Administration of Justice.*

The administration of the law, the verdicts of juries, the conduct of suitors and their witnesses, are all matters of lawful comment as soon as the trial is over. Any comment pending action is a contempt of court, by whomsoever made; it is especially so where the comment is supplied by one of the litigants or his solicitor or counsel. (*Daw* v. *Eley*, L. R. 7 Eq. 49; 38 L. J. Ch. 113; 17 W. R. 245.)

In former days, where a trial lasted more than one day, newspapers were sometimes forbidden to publish any report from day to day; they were ordered to reserve their whole report till the case was ended. But, unless such an order be made, daily reports of the progress of the trial are unobjectionable, if fair and impartial. (*Lewis* v. *Levy*, [*45] E. B. &. E. 537; 27 L. J. Q. B. 282; 4 Jur. N. S. 970.) But report is very different from comment. No observations on the case are permitted during its progress, lest the minds of the jury (and indeed of the judge) should be thereby biased. (*R.* v. *O'Dogherty*, 5 Cox, C. C. 348.)

But as soon as the case is over, every one has "a right to discuss fairly and *bonâ fide* the administration of justice as evinced at this trial. It is open to him to show that error was committed on the part of the judge and jury; nay, further, for myself I will say that the judges invite discussion of their acts in the administration of the law, and it is a relief to them to see error pointed out, if it is commit-

ted ; yet, whilst they invite the freest discussion, it is not open to a journalist to impute corruption." (Per Fitzgerald, J., in *R.* v. *Sullivan*, 11 Cox, C. C. 57.) "That the administration of justice should be made a subject for the exercise of public discussion is a matter of the most essential importance. But, on the other hand, it behoves those who pass judgment, and call upon the public to pass judgment, on those who are suitors to, or witnesses in, courts of justice, not to give reckless vent to harsh and uncharitable views of the conduct of others ; but to remember that they are bound to exercise a fair and honest and an impartial judgment upon those whom they hold up to public obloquy." (Per Cockburn, C. J., in *Woodgate* v. *Ridout*, 4 F. & F. 223, 4.) "Writers in public papers are of great utility, and do great benefit to the public interests by watching the proceedings of courts of justice, and fairly commenting on them if there is any thing that calls for observation ; but they should be careful, in discharging that function, that they do not wantonly assail the character of others, or impute criminality to them, and if they do so, and do not bring to the performance of the duty they discharge that due regard for the interests of others which the assumption of so important a censorship necessarily requires, they must take the consequences." Per Cockburn, C. J., in *Reg.* v. *Tunfield*, 42 J. P. at p. 424.)

Illustrations.

[* 46] It is not a fair comment on a criminal trial to suggest that the prisoner, though acquitted, was really guilty.

Lewis v. *Walter*, 4 B. & Ald. 605.

Risk Allah Bey v. *Whitehurst and others*, 18 L. T. 615.

It is not a fair comment on any legal proceedings to insinuate that a particular witness committed perjury in the course of them.

Roberts v. *Brown*, 10 Bing. 519 ; 4 Moo. & S. 407.

Stiles v. *Nokes*, S. C. *Carr* v. *Jones*, 7 East, 493 ; 3 Smith, 491.

Littler v. *Thompson*, 2 Beav. 129.

Felkin v. *Herbert*, 33 L. J. Ch. 294 ; 10 Jur. N. S. 62 ; 12 W. R. 241, 332 ; 9 L. T. 635.

A newspaper may comment on the evidence given by any particular witness in any inquiry on a matter of public interest ; but may not go the length of declaring such evidence to be "maliciously or recklessly false." Verdict for the plaintiff. Damages £250.

Hedley v. *Barlow*, 4 F. & F. 224.

A newspaper may comment on the conduct of magistrates in dismissing a case without hearing the whole of the evidence, or in committing the prisoner for trial on insufficient evidence ; but it must not impute that in so doing they acted deliberately and consciously from political motives.

Hibbins v. *Lee*, 4 F. & F. 243 ; 11 L. T. 541.

The details of a long-protracted squabble between a professional singer and a great composer do not become matters of public interest, merely because the former ultimately applies to a police magistrate for a summons against the latter.

Weldon v. *Johnson*, *Times* for May 27th, 1884.

The *Morning Post* published an article on a trial which had greatly excited public attention, giving a highly coloured account of the conduct of the attorneys on one side, concluding with the sweeping condemnation :—"Messrs. Quirk, Gammon, and Snap were fairly equalled, if not outdone," alluding to the notorious firm of pettifoggers in "Ten Thousand a Year." This account of plaintiff's conduct was taken almost verbatim from the speech of counsel on

the other side, and no allusion was made to the evidence subsequently produced to rebut his statements. Verdict for the plaintiff. Damages £1,000.

Woodgate v. *Ridout*, 4 F. & F. 202.

3. *Public Institutions and Local Authorities.*

The working of all public institutions, such as colleges, hospitals, asylums, homes, is a matter of public interest, especially where such institutions appeal to the public for subscriptions, or are supported by the rates, or are, like our Universities, national property. The management of local affairs by the various local authorities, e. g., town-councils, schoolboards, vestries, boards of guardians, boards of health, &c., is a matter of public, though it may not be of universal, concern.

Illustrations.

"The management of the poor and the administration of the poor-law in each local district are matters of public interest."

Per Cockburn, C. J., in *Purcell* v. *Sowler*, 2 C. P. D. 218; 46 L. J. C. P. 308; 25 W. R. 362; 36 L. T. 416.

The official conduct of a way-warden may be freely criticised in the local press.

Harle v. *Catherall*, 14 L. T. 801.

The manner in which a coroner's officer treats the poor relatives of the deceased when serving them with a summons for an inquest, and the behaviour of such officer in Court are matters of public concern.

Per Bowen, J., in *Sheppard* v. *Lloyd Daily Chronicle* for March 11, 1882.

The Charity Commissioners sent an inspector to inquire into the working of a medical college at Birmingham. He made a report containing passages defamatory of the plaintiff; one of the professors. The mismanagement of the college continued and increased. The warden at last filed a bill to administer the funds in Chancery. Thereupon the defendant, the proprietor of a local paper, procured an official copy of the report of the inspector, and published it *verbatim* in his paper. This was nearly three years after the report had been written. The plaintiff contended that this was a wanton revival of stale matter which could not be required for public information; but Cockburn, C. J., left it to the jury to say whether public interest in the matter had not rather increased than declined in the interval. Verdict for the defendant.

Cox v. *Feeney*, 4 F. & F. 13.

But the conduct of a trustee of a private corporation, as such trustee, is not a matter of public interest.

Wilson v. *Fitch*, 41 Cal. 363.

4. *Ecclesiastical Affairs.*

A bishop's government of his diocese, a rector's management of his parish, or of the parochial school, are matters of public interest. So is the manner in which "public worship" is celebrated in the Established Church. But an unobtrusive charitable organization privately established by the rector in the parish is not a fit subject for public comment.

Illustrations.

The press may comment on the fact that the incumbent of a parish has, contrary to the wishes of the church-warden, allowed books to be sold in the church during service, and cooked a chop in the vestry after the service was over.

Kelly v. *Tingling*, L. R. 1 Q. B. 699; 35 L. J. Q. B. 231; 14 W. R. 51; 13 L. T. 255; 12 Jur. N. S. 940.

[*48] But where a vicar started a clothing society in his parish, expressly excluding all Dissenters from its benefits, it was held that this was essentially a private society, the members of which might manage it as they pleased, without being called to account by anyone outside: and that therefore a Dissenting organ was not justified in commenting on the limits which the vicar had imposed on the desire of his parishioners to clothe the poor.

Gathercole v. *Miall*, 15 M. & W. 319; 15 L. J. Ex. 179; 10 Jur. 337.

And see *Walker* v. *Brogden*, 19 C. B. N. S. 65; 11 Jur. N. S. 671; 13 W. R. 809; 12 L. T. 495.

Booth v. *Briscoe* (C. A.) 2 Q. B. D. 496; 25 W. R. 838.

The court in *Gatherole* v. *Miall*, were equally divided on the question whether sermons preached in open church, but not printed and published, were matter for public comment. If the sermon itself dealt with matters of public interest, I apprehend it would be.

5. *Books, Pictures, &c.*

"A man who publishes a book challenges criticism." (Per Cockburn, C. J., in *Strauss* v. *Francis*, 4 F. & F. 1114; 15 L. T. 675). Therefore all fair and honest criticism on any published book is not libellous. But the critic must not go out of his way to attack the private character of the author. (*Fraser* v. *Berkeley*, 7 C. & P. 621.) So, too, it is not libellous fairly and honestly to criticise a painting publicly exhibited, or the architecture of any public building, however strong the terms of censure used may be. (*Thompson* v. *Shackell*, Moo. & Mal. 187.)

Illustrations.

The *Athenæum* published a critique on a novel written by the plaintiff, describing it as "the very worst attempt at a novel that has ever been perpetrated," and commenting severely on "its insanity, self-complacency, and vulgarity, its profanity, its indelicacy, (to use no stronger word), its display of bad Latin, bad French, bad German, and bad English," and its abuse of persons living and dead. After Erle, C. J., had summed up the case, the plaintiff withdrew a juror.

Strauss v. *Francis* (No. 1), 4 F. & F. 939.

See *Sir John Carr* v. *Hood*, 1 Camp. 355, n.

The *Athenæum* thereupon published another article stating their reason for consenting to the withdrawal of a juror, which was in fact that they considered the plaintiff would have been unable to have paid them their costs, had they gained a verdict. The plaintiff thereupon brought another action which was tried before Cockburn, C. J., and the jury found a verdict for the defendants.

Strauss v. *Francis* (No. 2), 4 F. & F. 1107; 15 L. T. 674.

[*49] It is doubtful how far a book printed for private circulation only, may be criticised.

Per Pollock, C. B., in *Gathercole* v. *Miall*, 15 M. & W. 334; 15 L. J. Ex. 179; 10 Jur. 337.

A comic picture of the author of a book, *as author*, bowing beneath the weight of his volume, is no libel; though a personal caricature of him as he appeared in private life would be.

Sir John Carr v. *Hood*, 1 Camp. 355, n.

The articles which appear in a newspaper and its general tone and style may be the subject of adverse criticism, as well as any other literary production; but no attack should be made on the private character of any writer on its staff.

Heriot v. *Stuart*, 1 Esp. 437.

Stuart v. *Lorell*, 2 Stark. 93.

Campbell v. *Spottiswoode*, 3 F. & F. 421; 32 L. J. Q. B. 185; 3 B. & S. 769; 9 Jur. N. S. 1069; 11 W. R. 569; 8 L. T. 201.

The greatest art critic of the day wrote and published in *Fors Clavigera* an article on the pictures in the Grosvenor Gallery, in which the following passage occurred: "Lastly, the mannerisms and errors of these pictures [alluding to the pictures of Mr. Burne Jones], whatever may be their extent, are never affected or indolent. The work is natural to the painter, however strange to us, and is wrought with the utmost conscience of care, however far to his own or our desire the result may yet be incomplete. Scarcely as much can be said for any other pictures of the modern school; their eccentricities are almost always in some degree forced, and their imperfections gratuitously, if not impertinently, indulged. For Mr. Whistler's own sake, no less than for the protection of the purchaser, Sir Coutts Lindsay ought not to have admitted works into the gallery in which the ill-educated conceit of the artist so nearly approached the aspect of wilful imposture. I have seen and heard much of cockney impudence before now, but never expected to hear a coxcomb ask 200 guineas for flinging a pot of paint in the public's face." The jury considered the words "wilful imposture" as just overstepping the line of fair criticism, and found a verdict for the plaintiff; damages one farthing. Each party had to pay his own costs.

Whistler v. *Ruskin, Times* for Nov. 26th and 27th, 1878.

Thompson v. *Shackell*, Moo. & Mal. 187.

The plaintiff was a professor of architecture in the Royal Academy. The defendant published an account of a new order of architecture called "the Bœotian," said to be invented by the plaintiff, whom he termed "the Bœotian professor." He set forth several absurd principles as the rules of this new order, illustrating them by examples of buildings all of which were the works of the plaintiff. The jury, under the direction of Lord Tenterden, C. J., found a verdict for the defendant.

Soane v. *Knight*, Moo. & Mal. 74.

And see *Gott* v. *Pulsifer*, 122 Mass. 235.

Cooper v. *Stone*, 24 Wend. 434.

6. *Theatres, Concerts, and Public Entertainments.*

All theatrical and musical performances, flower-shows, public balls, &c., may be freely criticised, provided that the comments be not malevolent or flagrantly unjust.

[*50] *Illustrations.*

A gentleman wholly unconnected with the stage got up what he called "a Dramatic Ball." The company was disorderly and far from select. No actor or actress of any reputation was present at the ball, or took any share in the arrangements. The *Era*, the special organ of the theatrical profession, published an indignant article, commenting severely on the conduct of the prosecutor in starting such a ball for his own profit, and particularly in calling such an assembly "a Dramatic Ball." See the article, 44 J. P. 377. Criminal proceedings were taken against the editor of the *Era*, but the jury found him Not guilty.

R. v. *Ledger, Times* for Jan. 14th, 1880.

And see *Dibdin* v. *Swan and Bostock*, 1 Esp. 28.

A newspaper, commenting on a flower-show, denounced one exhibitor by name as "a beggarly soul," "famous in all sorts of dirty work," and spoke of "the tricks by which he and a few like him used to secure prizes" as being now "broken in upon by some judges more honest than usual." Such remarks are clearly *not* fair criticism on the flower-show.

Green v. *Chapman*, 4 Bing. N. C. 92; 5 Scott, 340.

The plaintiff, the proprietor of Zadkiel's Almanac, had a ball of crystal by means of which he pretended to tell what was going on in the other world. The *Daily Telegraph* published a letter which stated that the plaintiff had "gulled" many of the nobility with this crystal ball, that he took money for "these profane acts, and made a good thing of it." Cockburn, C. J., directed the jury that a newspaper might expose what it deemed an imposition on the public; but that this letter amounted to a charge that the plaintiff had made money by wilful and fradulent misrepresentations, a charge which should not

be made without fair grounds. Verdict for the plaintiff. Damages one farthing.

Morrison v. *Belcher*, 3 F. & F. 614.
Duplany v. *Davis*, 3 Times L. R. 184.
Merrivale and wife v. *Carson*, 3 Times L. R. 431.

7. *Other Appeals to the Public.*

Whenever a medical man brings forward some new method of treatment, and advertises it largely as the best or only cure for some particular disease, or for all diseases at once, he may be said to invite public attention. So when a tradesman distributes handbills or circulars, he challenges public criticism. A newspaper writer is justified in warning the public against such advertisers, and in exposing the absurdity of their professions, provided he does so fairly and with reasonable moderation and judgment.

Again, where a man appeals to the public by writing letters to the newspaper, either to expose what he deems [*51] abuses, or to call attention to his own particular grievances, he cannot complain if the editor inserts other letters in answer to his own, refuting his charges, and denying his facts. A man who has commenced a newspaper warfare cannot complain if he gets the worst of it. But if such answer goes further, and touches on fresh matter in no way connected with the plaintiff's original letter, or unnecessarily assails the plaintiff's private character, then it ceases to be an *answer;* it becomes a counter-charge, and if defamatory will be deemed a libel.

So, too, when a man comes prominently forward in any way, and acquires for a time a *quasi*-public position, he cannot escape the necessary consequence—the free expression of public opinion. Whoever seeks notoriety, or invites public attention, is said to challenge public criticism; and he cannot resort to the law courts if that criticism be less favorable than he anticipated.

Illustrations.

A medical man who had obtained a diploma and the degree of M.D. from America advertised most extensively a new and infallible cure for consumption. The *Pall Mall Gazette* published a leading article on the subject of such advertisements, in which they called the advertiser a quack and an impostor, and compared him to "scoundrels who pass bad coin." The jury gave the plaintiff one farthing damages.

Hunter v. *Sharpe*, 4 F. & F. 983; 15 L. T. 421.
And see *Morrison and another* v. *Harmer and another*, 3 Bing. N. C. 759; 4 Scott, 524; 3 Hodges, 108.

A marine store dealer extensively circulated a handbill setting forth the high prices he was prepared to give for kitchen stuff, rags, bones, oilcloth, brass, copper, lead, plated metals, horsehair, and old clothes. An alderman sitting as magistrate at Guildhall denounced this handbill, as offering great inducements to servants to rob their masters. The alderman's remarks, together with the handbill itself *verbatim*, were published in the *Daily Telegraph*, with a heading "Encouraging Servants to Rob their Masters," and also a leading article in the same strain. The jury, under the direction of Erle, C. J., found a verdict for the defendant.

Paris v. *Levy*, 9 C. B. N. S. 342; 30 L. J. C. P. 11; 3 L. T. 324; 9 W. R. 71; 7 Jur. N. S. 289; and (at Nisi Prius) 2 F. & F. 71.
And see *Eastwood* v. *Holmes*, 1 F. & F. 347.

Jenner and another v. *A'Beckett*, L. R. 7 Q. B. 11; 41 L. J. Q. B. 14; 20 W. R. 181; 25 L. T. 464.

Two clergymen were engaged in a controversy; one, the plaintiff, wrote a [*52] pamphlet; subsequently he published a "collection of opinions of the press" on his own pamphlet, including an inaccurate or garbled extract from an article which had appeared in the defendant's newspaper. The defendant thereupon felt it his duty, in justice to the other clergyman, to publish an article in his newspaper exposing the inaccuracy of the extract as given by the plaintiff, and accusing him of purposely adding some passages and suppressing others, so as to entirely alter the sense. Erle, C. J., pointed out to the jury that the defendant was maintaining the truth, and that although he was led into exaggerated language, the plaintiff had also used exaggerated language himself. Verdict for the defendant.

Hibbs v. *Wilkinson*, 1 F. & F. 608.

But where the editor of the *Lancet* attacked the editor of a rival paper, the *London Medical and Physical Journal*, by rancorous aspersions on his private character, the plaintiff recovered a verdict, damages £5.

Macleod v. *Wakley*, 3 C. & P. 311.

So wherever a man calls public attention to his own grievances or those of his class, whether by letters in a newspaper, by speeches at public meetings, or by the publication of pamphlets, he must expect to have his assertions challenged, the existence of his grievances denied, and himself ridiculed and denounced.

Odger v. *Mortimer*, 28 L. T. 472.
Kœnig v. *Ritchie*, 3 F. & F. 413.
R. v. *Veley*, 4 F. & F. 1117.
O'Donoghue v. *Hussey*, Ir. R. 5 C. L. 124.
Dwyer v. *Esmond*, 2 L. R. (Ir.) 243.

But where the defendant in answering a letter which the plaintiff has sent to the paper, does not confine himself to rebutting the plaintiff's assertions, but retorts upon the plaintiff by inquiring into his antecedents, and indulging in other uncalled for personalities, the defendant will be held liable; for such imputations are neither a proper answer to, nor a fair comment on, the plaintiff's speech or letter.

Murphy v. *Halpin*, Ir. R. 8 C. L. 127.

Three clergymen of the Church of England, residing near Swansea, being Conservatives, chose to attend a meeting of the supporters of the Liberal candidate for Swansea; they behaved in an excited manner, hissed and interrupted the speakers, and had eventually to be removed from the room by two policemen. *Held* that such conduct might fairly be commented on in the local newspapers; and that even a remark that "appearances were certainly consistent with the belief that they had imbibed rather freely of the cup that inebriates" was not, under the circumstances, a libel.

Davis v *Duncan*, L. R. 9 C. P. 396; 43 L. J. C. P. 185; 22 W. R. 575; 30 L. T. 464.

PART II. [*53]

SLANDER.

Words which are clearly defamatory when written and published may not be actionable when merely spoken; for then other considerations apply. The reasons for the distinction have been already discussed, *ante*, pp. 3, 18. Spoken words are defamatory whenever special damage has in fact resulted from their use. Spoken words are also defamatory when the imputation cast by them on the plaintiff is on the face of it so injurious that the Court

will presume, without any proof, that his reputation has been thereby impaired. And the Court will so presume in three cases :—

I. Where the words charge the plaintiff with the commission of a crime ; or,

II. Impute to him a contagious or infectious disease tending to exclude him from society ; or,

III. Are spoken of him in the way of his office, profession, or trade.

In no other case are spoken words defamatory, unless they have caused some special damage to the plaintiff.

I. *Where the Words impute a Crime.*

Spoken words which impute that the plaintiff has been guilty of a crime punishable with imprisonment are actionable without proof of special damage. If the offence imputed be only punishable by penalty or fine, the words [*54] will not be actionable *per se*. *Webb* v. *Beavan*, 11 Q. B. D. 609 ; 52 L. J. Q. B. 544 ; 49 L. T. 201 ; 47 J. P. 488.)

It has been usual hitherto to state that words which impute an indictable offence are actionable *per se*, as all indictable offences are punishable with imprisonment. But there now are many offences which are not indictable and yet are punishable summarily with imprisonment in the first instance ; so the above appears a more accurate statement of the law. Words which merely impute an offence for which a magistrate can only inflict imprisonment in default of payment of a fine imposed are not, I apprehend, actionable *per se*. Words imputing to a licensed victualler that he had been guilty of an offence against the Licensing Acts would be actionable, as spoken of him in the way of his trade : and so would words spoken of a dairyman or grocer falsely alleging that he had been convicted under the Sale of Food and Drugs Act, 1875.

There has been considerable fluctuation of opinion as to the exact limits of this rule. In Queen Elizabeth's days some judges considered that words were actionable which imputed to the plaintiff conduct which would be sufficient ground for binding him over to good behaviour. (See *Sir Edward Bray* v. *Andrews* (1564), Moore, 63 ; *Lady Cockaine's Case* (1586), Cro. Eliz. 49 ; *Tibbott* v. *Haynes* (1590), Cro. Eliz. 191.) In Queen Anne's reign, on the other hand, Holt, C. J., in *Ogden* v. *Turner*, 6 Mod. 104 ; Holt, 40 ; 2 Salk. 696, lays it down that every charge of treason or felony is actionable, but not every charge of misdemeanour, only of such as entail a "scandalous" and "infamous" punishment. I presume, however, this would include all indictable misdemeanours, except such semi-civil proceedings as an indictment for the obstruction or non-repair of a highway.

It is not necessary that the defendant should specify the crime imputed, if it is clear that the plaintiff is accused of some crime

punishable with imprisonment. An innuendo, "meaning thereby that the plaintiff had been and was guilty of having committed some criminal offence or offences," was held sufficient in *Webb* v. *Beavan*, 11 Q. B. D. 609; 52 L. J. Q. B. 544; 49 L. T. 201; 47 J. P. 488.

Illustrations.

A general charge of felony is actionable, though it does not specify any particular felony. *E. g.:*

"If you had had your deserts, you would have been hanged before now."
Donne's Case, Cro. Eliz. 62.

"He deserves to have his ears nailed to the pillory."
Jenkinson v. *Mayne*, Cro. Eliz. 384; 1 Vin. Abr. 415.

[*55] "You have committed an act for which I can transport you."
Curtis v. *Curtis*, 10 Bing. 477; 3 M. & Scott, 819; 4 M. & Scott, 337.

"You have done many things for which you ought to be hanged, and I will have you hanged."
Francis v. *Roose*, 3 M. & W. 191; 1 H. & H. 36.

"I have got a warrant for Tempest. I shall transport him for felony."
Tempest v. *Chambers*, 1 Stark. 67.

"I will lock you up in Gloucester gaol next week. I know enough to put you there."
Webb v. *Beavan*, 11 Q. B. D. 609; 52 L. J. Q. B. 544; 49 L. T. 201; 47 J. P. 488.

So are all charges of specific felonies. *E. g.:*

Assault with intend to rob:—
Lewknor v. *Cruchley and wife*, Cro. Car. 140.

Attempt to murder:—
Scot et ux. v. *Hilliar*, Lane, 98; 1 Vin. Abr. 440.
Preston v. *Pinder*, Cro. Eliz. 308.

Bigamy:—
Heming et ux. v. *Power*, 10 M. & W. 564.
Delany v. *Jones*, 4 Esp. 191.

Burglary:—
Sommers v. *House*, Holt, 39; Skin. 364.

Demanding money with menaces:—
Neve v. *Cross*, Sty. 350.

Embezzlement:—
Williams v. *Stott*, 1 C. & M. 675; 3 Tyrw. 688.

Forgery:—
Baal v. *Baggerley*, Cro. Car. 326.
Jones v. *Herne*, 2 Wils. 87.

Larceny:—
Foster v. *Browning*, Cro. Jac. 688.
Baker v. *Pierce*, 2 Ld. Raym. 959; Holt, 654; 6 Mod. 23; 2 Salk. 695.
Slowman v. *Dutton*, 10 Bing. 402.
Tomlinson v. *Brittlebank*, 4 B. & Ad. 630; 1 N. & M. 455.

Manslaughter:—
Ford v. *Primrose*, 5 D. & R. 287.
Edsall v. *Russell*, 4 M. & G. 1090; 5 Scott, N. R. 801; 2 Dowl. N. S. 641; 12 L. J. C. P. 4; 6 Jur. 996.

Murder:—
Peake v. *Oldham*, Cowp. 275; S. C. *Sub nom. Oldham* v. *Peake*, 2 W. Bl. 959.
Button v. *Hayward*, 8 Mod. 24.

Receiving stolen goods, knowing them to have been stolen:—
Brigg's Case, Godb. 157.
Clark's Case de Dorchester, 2 Rolle's Rep. 136.
Alfred v. *Farlow*, 8 Q. B. 854; 15 L. J. Q. B. 258; 10 Jur. 714.

Robbery:—
Lawrence v. *Woodward*, Cro. Car. 277; 1 Roll. Abr. 74.

Rowcliffe v. *Edmonds et ux.*, 7 M. & W. 12 ; 4 Jur. 684.

[* 56] Treason :—

Sir William Waldegrave v. *Ralph Agas*, Cro. Eliz. 191.

Stapleton v. *Frier*, Cro. Eliz. 251.

Fry v. *Carne*, 8 Mod. 283.

Unnatural offences :—

Thomson v. *Nye*, 16 Q. B. 175 ; 20 L. J. Q. B. 85 ; 15 Jur. 285.

Woolnoth v. *Meadows*, 5 East, 463 ; 2 Smith, 28.

Colman v. *Godwin*, 3 Dougl. 90 ; 2 B. & C. 285, n.

So it is actionable without proof of special damage to charge another with the commission of the following misdemeanours :—

Bribery and corruption :—

Bendish v. *Lindsay*, 11 Mod. 194.

Conspiracy :—

Tibbott v. *Haynes*, Cro. Eliz. 191.

Keeping a bawdy-house :—

Brayne v. *Cooper*, 5 M. & W. 249.

Huckle v. *Reynolds*, 7 C. B. N. S. 114.

Libel :—

Sir William Russell v. *Ligon*, 1 Roll. Abr. 46 ; 1 Vin. Abr. 423.

Perjury :—

Ceely v. *Hoskins*, Cro. Car. 509.

Holt v. *Scholefield*, 6 T. R. 691.

Roberts v. *Camden*, 9 East, 93.

Even in an ecclesiastical Court,

Shaw v. *Thompson*, Cro. Eliz. 609.

Soliciting another to commit a crime :—

Sir Thomas Cockaine and wife v. *Witnam*, Cro. Eliz. 49.

Leversage v. *Smith*, Cro. Eliz. 710.

Tibbott v. *Haynes*, Cro. Eliz. 191.

Passie v. *Mondford*, Cro. Eliz. 747.

Deane v. *Eton*, 1 Buls. 201.

Sir Harbert Crofts v. *Brown*, 3 Buls. 167.

Subornation of perjury :—

Guerdon v. *Winterstud*, Cro. Eliz. 308.

Harris v. *Dixon*, Cro. Jac. 158.

Bridges v. *Playdel*, Brownl. & Golds. 2.

Harrison v. *Thornborough*, 10 Mod. 196 ; Gilbert's Cases in Law & Eq. 114.

Where the words impute merely a trespass in pursuit of game punishable primarily by fine alone, no action lies without proof of special damage, although imprisonment in the pillory may be inflicted in default of payment of the fine (3 Wm. & M. c. 10.)

Ogden v. *Turner* (1705), 6 Mod. 104 ; Salk. 696 ; Holt, 40.

[Certain *dicta* in this case which appear to go further, were disapproved of by Grey, C. J., in 3 Wils. 186, and must be now considered as bad law.]

Where the words imputed an offence against the Fishery Acts, punishable only by fine and forfeiture of the nets and instruments used : *Held* that no action lay without proof of special damage.

McCabe v. *Foot*, 18 Ir. Jur. (Vol. xi. N. S.) 287 ; 15 L. T. 115.

Defendant charged plaintiff with a breach of the 9th bye-law of the Great [* 57] Western Railway Company, which is punishable with a penalty of 40*s.* only. Field, J., held that no action lay.

Preston v. *De Windt*, *Times* for July 7th, 1884.

In Maryland adultery is still an offence against the State ; but punishable only by fine. Hence to impute adultery to a married woman is not actionable there. (I believe this is the only one of the United States in which the law is so.)

Griffin v. *Moore*, 43 Md. 246.

Shafer v. *Ahalt*, 48 Md. 171 ; 30 Amer. Rep. 456.

Words which merely impute a criminal intention, not yet put into action, are not actionable. Guilty thoughts are not a crime. But as soon as any step is

taken to carry out such intention, as soon as any overt act is done, an *attempt* to commit a crime has been made ; and every attempt to commit an indictable offence is at common law a misdemeanour, and in itself indictable. Per Lord Mansfield in *R.* v. *Scofield* (1784), Caldecott, 397. To impute such an attempt is therefore clearly actionable.

Harrison v. *Stratton*, 4 Esp. 217.

Words imputing a purely military offence are not actionable without proof of special damage.

Hollingsworth v. *Shaw*, 19 Ohio St. 430.

But where the speaker makes no definite charge of felony, but uses words which merely disclose a suspicion that is in his mind, no action lies, without proof of special damage.

Illustrations.

The clerk of the crown for the Island of Grenada said of the plaintiff, "He lies here under suspicion of having murdered a man named *Emanuel Vancrossen* at the *Spout* some years ago," and also, "Haven't you heard that *Charles Simmons* is suspected of having murdered one *Vancrossen*, his brother-in-law ? A proclamation offering a reward for the apprehension of the murderer is now in my office, and there is only one link wanting to complete the case." *Held*, that this amounted at the most to words of mere suspicion, and that no action lay.

Simmons v. *Mitchell*, 6 App. Cas. 156 ; 50 L. J. P. C. 11 ; 29 W. R. 401 ; 43 L. T. 710 ; 45 J. P. 237.

The following words do not amount to a charge of larceny :—

"You as good as stole the canoe."

Stokes v. *Arey*, 8 Jones, 46.

Or, "A man that would do that would steal."

Stees v. *Kemble*, 3 Casey (27 Penn. St.) 112.

The words, "I will take him to Bow Street on a charge of forgery," are not actionable, for they do not amount to a charge that the plaintiff had committed felony.

Harrison v. *King*, 4 Price, 46 ; 7 Taunt. 431.

The words "I charge him with felony," were held insufficient in three cases.

Poland v. *Mason* (1620), Hob. 305, 326.

Wheeler v. *Popleston* (1624), 1 Roll. Abr. 72.

Wood v. *Merrick* (1626), 1 Roll. Abr. 73.

[* 58] But, "Bear witness, my masters, I arrest him of felony," was held sufficient in

Serle v. *Maunder* (1620), 1 Roll. Abr. 72.

The words were, "I have a suspicion that you and Bone have robbed my house, and therefore I take you into custody." At the trial, Pollock, C. B., told the jury that if they found that the defendant meant to impute to the plaintiff an absolute charge of felony, in such case the plaintiff was entitled to the verdict ; but, on the other hand, if they should think that he imputed a mere suspicion of felony, the defendant would be entitled to the verdict. Verdict for defendant. *Held*, that the direction and the verdict were right.

Tozer v. *Mashford*, 6 Ex. 539 ; 20 L. J. Ex. 225.

But the words "I have got a warrant for Tempest. I will advertise a reward for 20 guineas to apprehend him. I shall transport him for felony," were properly found by the jury to amount to a substantive charge of felony.

Tempest v. *Chambers*, 1 Stark. 67.

An action lies for these words ; "Many an honester man has been hanged : and a robbery hath been committed, and I think he was at it ; and I think he is a horse-stealer."

Stich v. *Wisedome*, Cro. Eliz. 348.

And for these : "I think in my conscience if Sir John might have his will, he would kill the king."

Sidnam v. *Mayo*, 1 Roll. Rep. 427 ; Cro. Jac. 407.

Peake v. *Oldham*, Cowp. 275 ; 2 Wm. Bl. 959, *post*, p. 121.

The words were: "He is under a charge of a prosecution for perjury. *Griffith Williams* (meaning an attorney of that name) has the Attorney-General's directions to prosecute for perjury." Defendant did not justify. After verdict for the plaintiff it was moved in arrest of judgment that the words were not actionable, as they do not amount to an assertion that the charge is well founded. Lord Ellenborough, C. J., said: "These words, fairly and naturally construed, appear to us to have been meant, and to be calculated to convey the imputation of perjury actually committed by the person of whom they are spoken;" and the verdict and judgment stood.

Roberts v. *Camden*, 9 East, 93.

It is not necessary that the words should accuse the plaintiff of some fresh, undiscovered crime, so as to put him in jeopardy or cause his arrest. Of course, if such consequences have followed, they may be alleged as special damage; but where such consequences are impossible, the words are still actionable. Thus, to call a man a returned convict, or otherwise to falsely impute that he has been tried and convicted of a criminal offence, is actionable without special damage.

For it is at least quite as injurious to the plaintiff's reputation, to say that he has in fact been convicted, as to say that he will be, or [*59] ought to be, convicted. Many think that such statements should be actionable, even when *true*, if they are maliciously or unnecessarily volunteered. See *post*, p. 179.

Illustrations.

It is actionable without proof of special damage to say of the plaintiff that—

He had been in Launceston gaol and was burnt in the hand for coining.

Gainford v. *Take*, Cro. Jac. 536.

He "was in Winchester gaol, and tried for his life, and would have been hanged, had it not been for Leggat, for breaking open the granary of farmer A. and stealing his bacon." [Note that here the speaker appears to admit that the plaintiff was acquitted, but still asserts that he was in fact guilty.]

Carpenter v. *Tarrant*, Cas. temp. Hardwicke, 339.

"He was a thief and stole my gold." It was argued here that "was" denotes time past; so that it may have been when he was a child, and therefore no larceny; or in the time of Queen Elizabeth, since when there had been divers general pardons: *sed per cur.*: "It is a great scandal to be once a thief; for *pœna potest redimi, culpa perennis erit.*"

Boston v. *Tatam*, Cro. Jac. 623.

It is actionable to call a man "thief" or "felon," even though he once committed larceny, if after conviction he was pardoned either under the Great Seal or by some general statute of pardon.

Cuddington v. *Wilkins*, Hobart, 67, 81; 2 Hawk. P. C. c. 37, s. 48.

Leyman v. *Latimer and others*, 3 Ex. D. 15, 352; 46 L. J. Ex. 765; 47 L. J. Ex. 470; 25 W. R. 751; 26 W. R. 305; 37 L. T. 360, 819.

It is actionable to call a man falsely "a returned convict."

Fowler v. *Dowdney*, 2 M. & Rob. 119.

And see *Bell* v. *Byrne*, 13 East, 554.

In dealing with old cases on this point, care must be taken to remember the state of the criminal law as it existed at the date of publication.

Illustrations.

So long as the 18 Eliz. c. 3 was in force, it was actionable to charge a woman with being the mother, a man with being the putative father, of a bastard child, chargeable to the parish.

Anne Davis's Case, 4 Rep. 17; 2 Salk. 694; 1 Roll. Abr. 38.

Salter v. *Browne*, Cro. Car. 436 ; 1 Roll. Abr. 37.

So long as the penal statutes against Roman Catholics were in force it was actionable to say "He goes to mass," or "He harboured his son, knowing him to be a Romish priest."

Walden v. *Mitchell*, 2 Ventr. 265.

Smith v. *Flynt*, Cro. Jac. 300.

Secus, before such statutes were passed.

Pierrepont's Case, Cro. Eliz. 308.

[*60] So in many old cases such words as "She is a witch" were held actionable, the statutes 1 Jac. I. c. 11, being then in force. But that statute is now repealed by the 9 Geo. II. c. 5. s. 3; which also expressly provides that no action shall lie for charging another with witchcraft, sorcery, or any such offence.

Rogers v. *Gravat*, Cro. Eliz. 571.

Dacy v. *Clinch*, Sid. 53.

It was formerly the custom of the City of London, of the borough of Southwark, and also, it is said, of the City of Bristol, to cart whores. Hence, to call a woman a "whore" or "strumpet" in one of those cities is actionable, if the action be brought in the City Courts, which take notice of their own customs without proof. But no action will lie in the Superior Courts at Westminster for such words, because such custom has never been certified by the Recorder, and would now be difficult to prove.

Oxford et ux. v. *Cross* (1599), 4 Rep. 18.

Hassell v. *Capcot* (1639), 1 Vin. Abr. 395 ; 1 Roll. Abr. 36.

Cook v. *Wingfield*, 1 Str. 555.

Roberts v. *Herbert*, Sid. 97 ; 1 Keble, 418.

Stainton et ux. v. *Jones*, 2 Selw. N. P. 1205 (13th edn.) ; 1 Dougl. 380, n.

Theyer v. *Eastwick*, 4 Burr. 2032.

Brand and wife v. *Roberts and wife*, 4 Burr. 2418.

Vicars v. *Worth*, 1 Str. 471.

So, in Queen Elizabeth's days, it was held that no action lay for saying, "He keeps a bawdy-house ;" "for by the common law, he is not punishable, but by the custom of London ; and therefore this action ought to have been sued in the spiritual court" (*dissentiente* Glanvile).

Anon. (1598), Cro. Eliz. 643 ; Noy, 73.

But by 1606 the opinion of Glanvile prevailed ; and such words were held actionable ; "the keeping of a brothel-house is inquirable in the leet, and so a temporal offence."

Thorne v. *Alice Durham* (1606), Noy, 117.

Grove and wife v. *Hart* (1752), Sayer, 33 ; B. N. P. 7.

It was not apparently clear law till the present century (*R.* v. *Higgins* (1801), 2 East, 5 ; *R.* v. *Philipps* (1805), 6 East, 464), that it was a misdemeanour to solicit another to commit a crime, although the person solicited did nothing in consequence. Hence, in the following cases words were held not to be actionable, because no overt act was alleged to have followed the solicitation. They would be held actionable now.

Sir Edward Bray v. *Andrews* (1564), Moore, 63.

Eaton v. *Allen* (1599), 4 Rep. 16 ; Cro Eliz. 684.

Sir Herbert Crofts v. *Brown* (1617), 3 Buls. 167.

It was held in 1602 that no action lay for saying "Master Barnham did burn my barn with his own hands ;" for at that date it was not felony to burn a barn unless it were either full of corn or parcel of a mansion-house ; and defendant had not stated that his barn was either.

Barham's Case, 4 Rep. 20 ; Yelv. 21.

So it was in 1602 held not actionable to say:—"Thou hast received stolen swine, and thou knowest they were stolen ;" for receiving is not a common law offence, unless it amounts to comforting and assisting the felon as an accessory [*61] after the fact. But ever since 3 Wm. & Mary. c. 9, s. 4, and 4 Geo. I. c. 11, such words would be clearly actionable.

Dawes v. *Bolton* or *Boughton*, Cro. Eliz. 888 ; 1 Roll. Abr. 68.

Cox v. *Humphrey*, Cro. Eliz. 889.

A charge of deer stealing would be actionable now, though in 1705 it was held not actionable, because it was subject only to a penalty of 30*l*.

Ogden v. *Turner*, Salk. 696 ; Holt, 40 ; 6 Mod. 104.

So now it would of course be actionable to accuse a man of secreting a will ; though such an accusation was held not actionable in

Godfrey v. *Owen*, Palm. 21 ; 3 Salk. 327.

And is still apparently not actionable in America.

O'Hanlon v. *Myers*, 10 Rich. 128.

Where a vicar of a parish falsely declared that the plaintiff, a parishioner, was excommunicated, it was held an action lay ; possibly because the person excommunicated was at that date liable to imprisonment under the writ *de excommunicato capiendo ;* but there seems to have been some allegation of special damage in the declaration.

Barnabas v. *Traunter*, 1 Vin. Abr. 396.

But an accusation of adultery, fornication, &c., was never ground for an action in the civil courts. The persons accused had a remedy in the spiritual courts till the 18 & 19 Vict. c. 41 ; now he has none.

In South Carolina it was formerly actionable to call a white or his wife a mulatto.

Eden v. *Legare*, 1 Bay, 171.
Atkinson v. *Hartley*, 8 McCord, 203.
King v. *Wood*, 1 Nott & M. 184.

The words must clearly impute a crime punishable with imprisonment, although they need not state the charge with all the precision of an indictment. If merely fraud, dishonesty, immorality, or vice, be imputed, no action lies without proof of special damage. And even where words of specific import are employed (such as "thief" or "traitor" still no action lies if the defendant can satisfy the jury that they were not intended to impute crime, but merely as general terms of abuse, and meant no more than "rogue" or "scoundrel," and were so understood by all who heard the conversation. But if the bystanders reasonably understand the words as definitely charging the plaintiff with the commission of a crime, an action lies.

Illustrations.

"You forged my name :" these words are actionable, although it is not stated to what deed or instrument.

Jones v. *Herne*, 2 Wils. 87.

Overruling *Anon.*, 3 Leon. 231 ; 1 Roll. Abr. 65.

[*62] To say that a man is "forsworn" or "has taken a false oath" is not a sufficiently definite charge of perjury ; for there is no reference to any judicial proceeding. But to say "Thou art forsworn in a Court of record" is a sufficient charge of perjury ; for this will be taken to mean that he was forsworn while giving evidence in a Court of record before the lawfully appointed judge thereof on some point material to the issue before him.

Stanhope v. *Blith*, (1585), 4 Rep. 15.
Holt v. *Scholefield*, 6 T. R 691.
Ceely v. *Hoskins*, Cro. Car. 509.

To say "I have been robbed of three dozen winches ; you bought two, one at 3*s*., one at 2*s*. ; you knew well when you bought them that they cost me three times as much making as you gave for them, and that they could not have been honestly come by," is a sufficient charge of receiving stolen goods, knowing them to have been *stolen*. [An indictment which merely alleged that the prisoner knew the goods were not honestly come by would be bad. *R.* v. *Wilson*, 2 Mood. C. C. 52.]

Alfred v. *Farlow*, 8 Q. B. 854 ; 15 L J. Q. B. 258 ; 10 Jur. 714.

"He is a pick-pocket ; he picked my pocket of my money," was once held an insufficient charge of larceny.

Walls or *Watts* v. *Rymes*, 2 Lev. 51 ; 1 Ventr. 213 ; 3 Salk. 325.

But now this would clearly be held sufficient.

Baker v. *Pierce*, 2 Ld. Raym, 959; Holt, 654; 6 Mod. 23; 2 Salk. 695.

Stebbing v. *Warner*, 11 Mod. 255.

"He has defrauded a mealman of a roan horse" held not to imply a criminal act of fraud; as it is not stated that the mealman was induced to part with his property by means of any false pretence.

Richardson v. *Allen*, 2 Chit. 657.

Needham v. *Dowling*, 15 L. J. C. P. 9.

So none of the following words are actionable without proof of special damage:—

"Cheat":—

Savage v. *Robery*, 2 Salk. 693; Mod. 398.

Davis v. *Miller et ux.*, 2 Str. 1169.

"Swindler":—

Savile v. *Jardine*, 2 H Bl. 531.

Black v. *Hunt*, 2 L. R. Ir. 10.

Ward v. *Weeks*, 7 Bing. 211; 4 M. & P. 796.

"Rogue," "rascal," "villain," &c.:—

Stanhope v. *Blith*, 4 Rep. 15.

"Runagate":—

Cockaine v. *Hopkins*, 2 Lev. 214.

"Cozener":—

Brunkard v. *Segar*, Cro. Jac. 427; Hutt. 13; 1 Vin. Abr. 427.

"Common-filcher":—

Goodale v. *Castle*, Cro. Eliz. 554.

"Welcher":—

Blackman v. *Bryant*, 27 L. T. 491.

But "welcher" is actionable, if the jury are satisfied the word means "one [*63] who takes money from those who make bets with him, intending to keep such money for himself and never to part with it again."

Williams v. *Magyer*, *Times* for March 1st, 1883.

The words "gambler," "black-leg," "black-sheep," are not actionable unless it can be shown that the bystanders understood them to mean "a cheating gambler punishable by the criminal law."

Barnett v. *Allen*, 3 H. & N. 376; 27 L. J. Ex. 412; 1 F. & F. 125; 4 Jur. N. S. 488.

If the crime imputed be one of which the plaintiff could not by any possibility be guilty, and all who heard the imputation knew that he could not by any possibility be guilty thereof, no action lies, for the plaintiff is never in jeopardy, nor is his reputation in any way impaired. (Buller's N. P. 5.)

In America this doctrine was carried to great lengths. If one joint-owner accused his partner of stealing the joint property no action lay, because a joint-owner cannot steal the joint property. But now the more sensible rule prevails, that if the words would convey an imputation of felony to the minds of ordinary hearers unversed in legal technicalities, an action lies, *e. g.*, where an infant is accused of a crime, and nothing said about special malice. (*Stewart* v. *Howe*, 17 Ill. 71; and see *Chambers* v. *White*, 2 Jones, 383, as to physical inability to commit the crime alleged.) The words are actionable if they are calculated to induce the hearers to suspect that the plaintiff had committed a crime. (*Drummond* v. *Leslie*, 5 Blackf. (Indiana) 453.)

Illustrations.

Words complained of:—"Thou hast killed my wife." Everyone who heard

the words knew at the time that defendant's wife was still alive ; they could not therefore understand the word "kill" to mean "murder"

Snag v. *Gee*, 4 Rep. 16, as explained by Parke, B., in *Heming* v. *Power*, 10 M. & W. 569.

And see *Web* v. *Poor*, Cro. Eliz. 569.

Talbot v. *Case*, Cro. Eliz. 823.

Dacy v. *Clinch*, Sid. 53.

Jacob v. *Mills*, 1 Ventr. 117 ; Cro. Jac. 343.

It is no slander to say of a churchwarden that he stole the bell-ropes of his parish church ; for they are officially his property ; and a man cannot steal his own goods. [But such words might be actionable as a charge on him in his office.]

Jackson v. *Adams*, 2 Bing. N. C. 402 ; 2 Scott, 599 ; 1 Hodges, 339.

[*64] So it is not actionable for A. to charge a man who is not A's clerk or servant with embezzling A's money ; for no indictment for embezzlement would lie. [But surely this can only be the case where the bystanders are aware of the exact relationship between A. and the plaintiff.]

Williams v. *Stott*, 1 C. & M. 675 ; 3 Tyrw. 688.

But where a married women said, "You stole my faggots," and it was argued for the defendant that a married woman could not own faggots, and therefore no one could steal faggots of hers : the Court construed the words according to common sense and ordinary usage to mean, "You stole my husband's faggots."

Stamp and Wife v. *White and Wife*, Cro. Jac. 600.

Charnel's Case, Cro, Eliz. 279.

When the charge is made *bonâ fide* while giving the plaintiff into custody or prosecuting him according to law, it will be privileged ; see *post*, c. VIII. pp. 221, 222.

II. *Where the Words impute a Contagious Disease.*

Words imputing to the plaintiff that he has an infectious or contagious disease are actionable without proof of special damage. For the effect of such an imputation is naturally to exclude the plaintiff from society. Such disease may be either leprosy, venereal disease, or, it seems, the plague (*Villers* v. *Monsley*, 2 Wils. 403) : but not the itch, the falling sickness, or the small-pox, which the judges apparently considered less infectious. The words must distinctly impute that the plaintiff has the disease at the time of publication : an assertion that he *has had* such a disease would not cause him to be shunned. (*Carslake* v. *Mapeldoram*, 2 T. R. 473 : *Taylor* v. *Hall*, 2 Str. 1189.)

Any words which the hearers would naturally understand as conveying that the plaintiff then has such a disease are sufficient. Many distinctions are drawn in old cases about the pox, a word which may imply either the actionable syphilis, or the less objectionable small-pox. It has been decided that "he has the pox" (*simpliciter*) shall be taken to mean "he has the small-pox ;" but that if any [*65] other words be used referring to the effects of the disease, or the way in which it was caught, or even the medicine taken to cure it, these may be referred to as determining which pox was meant.

Illustrations.

To say of a person, "He hath the falling sickness" is not actionable unless it be spoken of him in the way of his profession or trade.

Taylor v. *Perr* (1607), 1 Rolle's Abr. 44.

To say to the plaintiff, "Thou art a leprous knave," is actionable.

Taylor v. *Perkins* (1607), Cro. Jac. 144; 1 Rolle's Abr. 44.

To say of the plaintiff that "He hath the pox" is actionable, whenever the word "wench" or "whore" occurs in the same sentence.

Brook v. *Wise* (1601), Cro. Eliz. 878.
Pye v. *Wallis* (1658), Carter 55.
Grimes v. *Lovel*, 12 Mod. 242.
Whitfield v. *Powel*, 12 Mod. 248.
Clifton v. *Wells*, 12 Mod. 634.
Bloodworth v. *Grey*, 7 M. & Gr. 334; 8 Scott, N. R. 9.
And see *Clerk* v. *Dyer*, 8 Mod. 290.

III. Words which are spoken of the Plaintiff in the way of his Profession or Trade; or disparage him in an Office of Public Trust.

Such words are actionable without proof of any special damage. It *must* injure the plaintiff's reputation to disparage him in his very means of livelihood. Where the Court sees that the words spoken affect the plaintiff in his office, profession, or trade, and directly tend to prejudice him therein, they ask for no further proof of damage. But the jury must be satisfied that the words were spoken of the plaintiff in relation to his office, profession, and trade, and that he held such office, or was actively engaged in such profession or trade, at the time the words were spoken; [*66] if not, proof of special damage will be required. (*Bellamy* v. *Burch*, 16 M. & W. 590.)

The office held by the plaintiff need not be one of profit; it may be merely confidential and honorary, as that of a justice of the peace. The gist of an action of slander is the injury to the plaintiff's reputation, and not any presumed loss of money. Hence a justice of the peace can recover damages for a slander on him in his office; although there is no emolument attached to it, so that his removal would involve no pecuniary loss. So, too, a physician or a barrister may sue for any slander imputing professional misconduct, although in contemplation of law their fees are mere gratuities.

There are some offices and professions intermittent in their nature though annually recurring. A revising barrister or a registration agent is generally re-appointed each year. I apprehend he could sue for a slander of him in such capacity although uttered after his duties for the year were over, provided such words would seriously imperil his chance of being re-appointed.

The plaintiff must always aver on the pleadings that he was carrying on the profession or trade, or holding the office, at the time the words were spoken. Sometimes this is admitted by the slander itself, and if so, evidence is of course unnecessary in proof of this averment. (*Trisarri* v. *Clement*, 2 C. & P. 223; 3 Bing. 432.) But in other cases, unless it is admitted on the pleadings, evidence must be given at the trial of the special character in which plaintiff sues. As a rule, it is sufficient for plaintiff to prove that

he was acting in the office or actively engaged in the profession or trade without proving any appointment thereto, or producing a diploma or other formal qualification. *Omnia presumuntur rite esse acta.* (*Rutherford* v. *Evans*, 4 C. & P. 79 ; 6 Bing. 451 ; *Berryman* v. *Wise*, 4 T. R. 366 ; *Cannell* v. *Curtis*, 2 Bing. N. C. 228.) That he so acted on one occasion before the one in question is evidence to go to the jury. (*R.* v. *Murphy*, 8 C. & P. 297.) But there is an exception to this rule where the very slander complained of imputes to a medical or legal practitioner that he is a quack or impostor, not legally qualified for practice : here the plaintiff must be prepared to prove his qualification strictly by producing diplomas or certificates duly sealed, signed and stamped. *Collins* v. *Carnegie*, 3 N. & M. 703 ; 1 Ad. & E. 695 ; *Moises* v. *Thornton*, 8 T. R. 303; *Wakley* v. *Healey & Cooke*, 4 Exch. 53; 18 L. J. Ex. 426.)

Whether or no the words were spoken of the plaintiff in the way of his [*62] business, is a question for the jury to determine at the trial. (Per Cockburn, C. J., in *Ramsdale* v. *Greenacre*, 1 F. & F. 61.) There should always be an averment in the statement of claim that the words were so spoken ; though, where the words are clearly of such a nature as necessarily to affect the plaintiff in his office or business, the omission of such an averment will not be fatal. (*Stanton* v. *Smith*, 2 Ld. Raym. 1480 ; 2 Str. 762 ; *Jones* v. *Littler*, 7 M. & W. 423 ; 10 L. J. Ex: 171.)

Illustrations.

It is actionable without proof of special damage :—

To say that a judge gives corrupt sentences.

Cæsar v. *Curseny*, Cro. Eliz. 305.

To say that a clergyman had been guilty of gross immorality and had appropriated the sacrament money.

Highmore v. *Earl and Countess of Harrington*, 3 C. B. N. S. 142.

To say of an attorney that he deserved to be struck off the roll.

Phillips v. *Jansen*, 2 Esp. 624.

Warton v. *Gearing*, 1 Vict. L. R. C. L. 122.

To say of a watchmaker, "he is a bungler, and knows not how to make a good watch."

Redman v. *Pyne*, 1 Mod. 19.

To in any way impute insolvency or bankruptcy to any merchant or trader.

Arne v. *Johnson*, 10 Mod. 111.

Davis v. *Lewis*, 7 T. R. 17.

But it by no means follows that *any* words spoken to the disparagement of an officer, professional man, or trader, will *ipso facto* be actionable *per se*. Words to be actionable on this ground, "must *touch* the plaintiff in his office, profession or trade :" that is, they must be shown to have been spoken of the plaintiff in relation thereto, and to be such as would prejudice him therein. They must impeach either his skill or knowledge, or his official or professional conduct. It is true that his special office or situation need not be expressly referred to, if the charge made be such as must necessarily affect it. And in determining whether the words used would necessarily affect the plaintiff in his office, profession or trade, regard must be had to the rank and position of the plaintiff, and to the mental and moral requirements of the office he holds.

Words may be actionable [*68] if spoken of a clergyman or a barrister, which would not be actionable of a trader or a clerk.

Thus, where integrity and ability are essential to the due conduct of plaintiff's office, words impugning the integrity or ability of the plaintiff are clearly actionable without any express mention of that office; for they distinctly imply that he is unfit to continue therein. But where the plaintiff does not hold any situation of trust or confidence, words which merely convey a general imputation of immorality, or charge him with some misconduct not connected with his special profession or trade, will not be actionable.

Illustrations.

To impute immorality or adultery to a beneficed clergyman is actionable; for it is ground of deprivation.

Gallwey v. *Marshall*, 9 Exch. 294; 23 L. J. Ex. 78; 2 C. L. R. 399.

Not so in the case of a physician.

Ayre v. *Craven*, 2 A. & E. 2; 4 Nev. & M. 220.

Or a staymaker.

Brayne v. *Cooper*, 5 M. & W. 249.

Or a clerk to a gas company.

Lumby v. *Allday*, 1 C. & J. 301; 1 Tyrw. 217.

To say of a superintendent of police that "he has been guilty of conduct unfit for publication" is not actionable, unless the words were spoken of him with reference to his office.

James v. *Brook*, 9 Q. B. 7; 16 L. J. Q. B. 17; 10 Jur. 541.

It is actionable to impute *habitual* drunkenness to a beneficed clergyman.

Dod v. *Robinson*, Al. 63.

McMillan v. *Birch*, 1 Binn. 178.

Or to a master mariner in command of a vessel.

Irwin v. *Brandwood*, 2 H. & C. 960; 33 L. J. Ex. 257; 9 L. T. 772; 10 Jur. N. S. 370; 12 W. R. 438.

Hamon v. *Falle*, 4 App. Cas. 247; 48 L. J. P. C. 45.

Or to a schoolmaster.

Hume v. *Marshall*, 42 J. P. 136.

Brandrick v. *Johnson*, 1 Vict. L. R. C. L. 306.

It would not be actionable where sobriety was not an essential qualification for the post. And to state that a clergyman or a schoolmaster was drunk on one particular occasion, and that neither in church nor in school, would not be actionable; as that alone would not necessitate his removal from his office.

Anon., 1 Ohio, 83, n.

Tighe v. *Wicks*, 33 Up. Can. Q. B. Rep. 470.

Brandrick v. *Johnson*, 1 Vict. L. R. C. L. 306.

[*69] To state that a head-fireman was drunk at a fire is actionable.

Gottbehuet v. *Hubachek*, 36 Wisconsin, 515.

But to say that a private citizen was drunk once is not.

Warren v. *Norman*, Walk. (Mississippi) 387.

Buck v. *Hersey*, 31 Maine, 558.

And see *Chaddock* v. *Briggs*, 13 Mass. 248.

Hayner v. *Cowden*, 27 Ohio St. 292.

To say of an attorney that "he hath the falling sickness" is actionable without special damage, because that disables him in his profession.

Taylor v. *Perr* (1607), 1 Roll. Abr. 44.

But it is not actionable to say of an attorney "He has defrauded his creditors, and has been horsewhipped off the course at Doncaster;" for it is no part of his professional duties to attend horse-races.

Doyley v. *Roberts*, 3 Bing. N. C. 835; 5 Scott, 40; 3 Hodges, 154.

To say of a livery-stable-keeper: "You are a regular prover under bankruptcies, a regular bankrupt maker," is not actionable; for it is not a charge against him in the way of his trade.

Angle v. *Alexander*, 7 Bing, 119; 1 Cr. & J. 143; 4 M. & P 870; 1 Tyrw. 9.

But it is actionable, without proof of special damage, to say of a gamekeeper that "he trapped three foxes;" for that would be misconduct in a gamekeeper.

Foulger v. *Newcomb*, L. R. 2 Ex. 327; 36 L. J. Ex. 169; 15 W. R. 1181; 16 L. T. 595.

So to say of an auctioneer, "You are a deceitful rascal, a villain, and a liar. I would not trust you with an auctioneer's licence. You robbed a man you called your friend; and, not satisfied with 10*l.*, you robbed him of 20*l.* a fortnight ago," was held actionable by Cockburn, C. J., in

Ramsdale v. *Greenacre*, 1 F. & F. 61.

And see *Bryant* v. *Loxton*, 11 Moore, 344.

But to say of a land speculator, "He cheated me of 100 acres of land," was held in Canada not to touch him in his trade and therefore not actionable.

Fellowes v. *Hunter*, 20 Up. Can. Q. B. 382.

See *Sibley* v. *Tomlins*, 4 Tyrw. 90, *post*, p. 82.

To call a dancing mistress "an hermaphrodite" is not actionable; for girls are taught dancing by men as often as by women.

Wetherhead v. *Armitage*, 2 Lev. 233; 3 Salk. 328; Freem. 277; 2 Show. 18.

Secus, in America, *Malone* v. *Stewart*, 15 Ohio, 319.

To say of the keeper of a restaurant, "You are an infernal rogue and swindler," was held not to be actionable without proof of special damage, as not of itself necessarily injurious to a restaurant keeper for, as the Supreme Court of Victoria remarked, "in fact there might be very successful restaurant keepers, who were both rogues and swindlers."

Brady v. *Youlden*, Kerferd & Box's Digest of Victoria Cases, 709; *Melbourne Argus* Reports, 6th September, 1867.

So to call a carpenter "a rogue," or a cooper "a varlet and a knave," is clearly not actionable *per se*; for the words do not touch them in their trades.

Lancester v. *French*, 2 Str. 797.

Cotes v. *Ketle*, Cro. Jac. 204.

[*70] A declaration alleged that the defendant falsely and maliciously spoke of the plaintiff, a working stone-mason, "He was the ringleader of the nine hours' system," and "He has ruined the town by bringing about the nine hours' system," and "He has stopped several good jobs from being carried out, by being the ringleader of the system, at Llanelly," whereby the plaintiff was prevented from obtaining employment in his trade at Llanelly: *Held*, on demurrer, that, the words not being in themselves defamatory, nor connected by averment or by implication with the plaintiff's trade, and the alleged damage not being the natural or reasonable consequence of the speaking of them, the action could not be sustained.

Miller v. *David*, L. R. 9 C. P. 118; 43 L. J. C. P. 84; 22 W. R. 332; 30 L. T. 58.

Again, where a special kind of knowledge is essential to the proper conduct of a particular profession, denying that the plaintiff possesses such special knowledge will be actionable, if the plaintiff belongs to that particular profession, but not otherwise.

Illustrations.

It has been held actionable without special damage:—

To say of a barrister, "He is a dunce, and will get little by the law" [though here it was argued for the defendant that Duns Scotus was "a great learned man;" that though to call a man "a dunce" might in ordinary parlance imply that he was dull and heavy of wit, yet it did not deny him a solid judgment; and that to say "he will get little by the law" might only mean that he did not wish to practise].

Peard v. *Jones* (1635), Cro. Car. 382.

To say of an attorney, "He has no more law than Master Cheyny's bull," or "He has no more law than a goose."

Baker v. *Morfue*, vel *Morphew*, Sid. 327; 2 Keble, 202.

[According to the report in Keble, an objection was taken in this case on behalf of the defendant, that it was not averred in the declaration, "that Cheyny had a bull, *sed non allocatur*, for the scandal is the greater, if he had none." And the Court adds a solemn *quære* as to saying "He has no more law than the man in the moon," feeling no doubt a difficulty as to ascertaining the precise extent of that individual's legal acquirements. But see *Day* v. *Buller*, 3 Wils. 59 *post*, p. 76, where the Court strangely decides that it is defamatory to say of an attorney that "he is no more a lawyer than the devil!"]

To say of an attorney, "He can't read a declaration."

Powell v. *Jones*, 1 Lev. 297.

To say of a physician that "he is no scholar," "because no man can be a good physician, unless he be a scholar."

Cawdrey v. *Highley, al. Tythay*, Cro. Car. 270; Godb. 441.

[*71] To say of the deputy of Clarencieux, king-at-arms, "He is a scrivener and no herald."

Brooke v. *Clarke*, Cro. Eliz. 328; 1 Vin. Abr. 464.

To charge any public officer falsely with gross ignorance of his duties is actionable *per se* in America.

Spiering v. *Andrae*, 45 Wisconsin, 330.

To say of a midwife, "Many have perished for her want of skill."

Flowers' Case, Cro. Car. 211.

To charge an apothecary with having caused the death of a child by administering to it improper medicines.

Edsall v. *Russell*, 4 M. & Gr. 1090; 5 Scott, N. R. 801; 2 Dowl. N. S. 641; 12 L. J. C. P. 4; 6 Jur. 996.

Tutty v. *Alewin*, 11 Mod. 221.

Where an architect is engaged to execute certain work, it is a libel upon him in the way of his profession to write to his employers asserting that he has no experience in that particular kind of work, and is therefore unfit to be entrusted with it.

Botterill and another v. *Whytehead*, 41 L. T. 588.

But since no special learning or ability is expected of a justice of the peace, it is not actionable to call him a "fool," "ass," "blockhead," or any other words merely imputing want of natural cleverness or ignorance of law. But words which impute to him corruption, dishonesty, extortion, or sedition are actionable of course.

Bill v. *Neal*, 1 Lev. 52.

How v. *Prin*, Holt, 652; 2 Salk. 694; 2 Ld. Raym. 812; 7 Mod. 107; 1 Bro. Parl. C. 64.

Aston v. *Blagrave*, 1 Str. 617; 8 Mod. 270; Fort. 206; 2 Ld. Raym. 1369.

It will be well to deal more particularly with certain special offices and professions.

Persons holding any Office of Confidence and Trust.

Words which impute a want of integrity to any one holding an office of confidence or trust, whether an office of profit or not, are clearly actionable *per se*. So if the words employed have a natural tendency to cause the plaintiff to be removed from his office, as by imputing insufficiency or gross incompetency, or habitual negligence of his duties. But where the words merely impute want of ability, without ascribing to the plaintiff any wicked or dishonest conduct; there no action lies, at all events, where the office is honorary, as in the case of a sheriff or a justice of the peace. (Per

Holt, C. J., in *How* v. *Prin*, Holt, 653 ; 2 Salk. 694 ; and compare *R.* v. *Darby*, 3 Mod. 136, with *Prowse* v. *Wilcox*, *ib.* 163.)

As the danger of plaintiff's losing his office is the gist of the action, it is essential that plaintiff should hold the office at the time the words [* 72] were spoken. (Per De Grey, C. J., in *Onslow* v. *Horne*, 3 Wils. 188 ; 2 W. Bl. 753, overruling the *dictum* of Pollexfen, C. J., in *Walden* v. *Mitchell*, 2 Vent. 266.)

Illustrations.

It is actionable without proof of special damage :—

To accuse a Royal Commissioner of taking bribes.

Moor v. *Foster*, Cro. Jac. 65.

Purdy v. *Stacey*, 5 Burr. 2698.

To say of a justice of the peace, "Mr. Stuckley covereth and hideth felonies, and is not worthy to be a justice of the peace ;" "for it is against his oath and the office of a justice of peace, and a good cause to put him out of the commission."

Stuckley v. *Bulhead*, 4 Rep. 16.

And see *Sir John Harper* v. *Beamond*, Cro. Jac. 56.

Sir Miles Fleetwood v. *Curl*, Cro. Jac. 557 ; Hob. 268.

To say of a justice of the peace that "he is a Jacobite and for bringing in the Prince of Wales and Popery ;" for this implies that he is disaffected to the established Government and should be removed from office immediately.

How v. *Prin* (1702), Holt, 652 ; 7 Mod. 107 ; 2 Ld. Raym. 812 ; 2 Salk. 694 Affirmed in House of Lords *sub nom. Prinne* v. *Howe*, 1 Brown's Parly. Cases, 64.

To insinuate that a justice of the peace takes bribes or "perverts justice to serve his own turn."

Cæsar v. *Curseny*, Cro. Eliz. 305.

Carn v. *Osgood*, 1 Lev. 280.

Alleston v. *Moor*, Hetl. 167.

Masham v. *Bridges*, Cro. Car. 223.

Isham v. *York*, Cro. Car. 15.

Beamond v. *Hastings*, Cro. Jac. 240.

Aston v. *Blagrave*, 1 Str. 617 ; 8 Mod. 270 ; 2 Ld. Raym. 1369 ; Fort. 206.

Lindsey v. *Smith*, 7 Johns. 359.

To say to a churchwarden, "Thou art a cheating knave and hast cheated the parish of £40."

Strode v. *Holmes* (1651), Styles, 338 ; 1 Roll. Abr. 58.

Woodruff v. *Wooley*, 1 Vin. Abr. 463.

Jackson v. *Adams*, 2 Bing. N. C. 402 ; 2 Scott, 599 ; 1 Hodges, 339.

To call an escheator, attorney, or other officer of a Court of Record, an "extortioner."

Stanley v. *Boswell*, 1 Roll. Abr. 55.

To say of a town-clerk that he hath not performed his office according to law.

Fowell v. *Cowe*, Rolle's Abr. 56.

Wright v. *Moorhouse*, Cro. Eliz. 358.

Or that he destroyed votes at an election.

Dodds v. *Henry*, 9 Mass. 262.

To say of a constable, "He is not worthy the office of constable."

Taylor v. *How*, Cro. Eliz. 861 ; 1 Vin Abr. 464.

[*73] In America it has been held actionable to charge a member of a nominating convention of a political party with having been influenced by a bribe.

Hand v. *Winton*, 38 N. Y. 122.

And see *Sanderson* v. *Caldwell*, 45 N. Y. 398.

Dolloway v. *Turrell*, 26 Wend. (N. Y.) 383.

Stone v. *Cooper*, 2 Denio (N. Y.) 193.

Hand v. *Winton*, 9 Vroom, 122.

So, too, in Canada, where the plaintiff was charged with being a public robber

—innuendo, that he, plaintiff, had defrauded the public in his dealings with them; it was held not necessary for plaintiff to aver that he is in any office, trade, or employment in which he could have defrauded the public.

Taylor v. *Carr.*, 3 Up. Can. Q. B. Rep. 506.

But it is *not* actionable without proof of special damage:—

To impute insincerity to a member of Parliament.

Onslow v. *Horne*, 3 Wils. 177; 2 W. Bl. 750.

Or weakness of understanding to a candidate for Congress.

Mayrant v. *Richardson*, 1 Nott & M. 347.

Or to call such a candidate "a corrupted old Tory."

Hogg v. *Dorrah*, 2 Post. (Alabama), 212.

To say of a justice of the peace, "He is a fool, an ass, and a beetle-headed justice;" for these are but general terms of abuse and disclose no ground for removing the plaintiff from office.

Bill v. *Neal*, 1 Lev. 52.

Sir John Hollis v. *Briscow et ux.*, Cro. Jac. 58.

To say of a justice of the peace, "He is a logger-headed, a slouch-headed, bursen-bellied hound."

R. v. *Farre*, 1 Keb. 629.

To say of a justice of the peace, "He is a blood-sucker and sucketh blood:" "for it cannot be intended what blood he sucketh."

Sir Christopher Hilliard v. *Constable*, Cro. Eliz. 306; Moore, 418.

Clergymen and Ministers.

Words are actionable if spoken of a beneficed clergyman which would not be actionable if spoken of one without cure of souls. (*Gallwey* v. *Marshall*, 9 Ex. 294; 23 L. J. Ex. 78; 2 C. L. R. 399.) But it does not follow that all words which tend to bring a beneficed clergyman into disrepute, or which merely impute that he has done something wrong, are actionable without special damage. The reason always assigned for this distinction between beneficed clergymen and others is that the charge, if true, would be ground of degradation or deprivation. (*Drake* v. *Drake*, 1 Roll. Abr. 58; *Dod* v. *Robinson* (1648), Aleyn, 63; *Pemberton* v. *Colls*, 10 Q. B. 461; 16 L. J. Q. B. 403; 11 Jur. 1011.) The imputation must therefore be such as, if true, would tend to prove the plaintiff unfit to continue in his office, and therefore tend more or less directly to proceedings being taken [*74] by the bishop. If the plaintiff holds any chaplaincy, lectureship, or readership, from which he might be removed, he will come within the same rules as a beneficed clergyman. (*Payne* v. *Beawmorris*, 1 Lev. 248.) But a clergyman without any preferment or office stands on the same footing as a dissenting minister, and must prove that some pecuniary damage has followed from the speaking of the words. (See *Hartley* v. *Herring*, 8 T. R. 130.)

Illustrations.

It is actionable without proof of special damage—

To say of a parson that "he had two wives;" for though bigamy was not made felony till 1603, still in 1588 it was "cause of deprivation."

Nicholson v. *Lyne*, Cro. Eliz. 94.

To say that "he is a drunkard, a whoremaster, a common swearer, a common liar, and hath preached false doctrine, and deserves to be degraded;" for "the matters charged are good cause to have him degraded, whereby he should lose his freehold."

Dod v. *Robinson*, (1648), Aleyn, 63.

Dr. Sibthorpe's Case, W. Jones, 366; 1 Roll. Abr. 76.

To say "he preacheth lyes in the pulpit;" "*car ceo est bon cause de deprivation.*"

Drake v. *Drake* (1652), 1 Roll. Abr. 58; 1 Vin. Abr. 473.

[These cases clearly overrule *Parret* v. *Carpenter*, Noy, 64; Cro Eliz. 502, wherein it was held that an action could lie only in the spiritual court for saying of a parson:—"Parret is an adulterer, and hath had two children by the wife of J. S., and I will cause him to be depr'ved for it." See the remarks of Pollock, C. B., 23 L. J. Ex. 80]

To say to a parson, "Thou hast made a seditious sermon, and moved the people to sedition to-day."

Philips, B. D. v. *Badby* (1582), cited in *Bittridge's Case*, 4 Rep. 19.

To say of a parson, "He preaches nothing but lies and malice in the pulpit;" for the words are clearly spoken of him in the way of his profession.

Crauden v. *Walden*, 3 Lev. 17.

Bishop of Sarum v. *Nash*, B. N. P. 9; Willes, 23.

And see *Pocock* v. *Nash*, Comb. 253.

Musgrave v. *Bovey*, 2 Str. 946.

To say to a clergyman, "Thou art a drunkard," is not of itself actionable; but it is submitted that to impute to a clergyman habitual drunkenness, or drunkenness whilst engaged in the discharge of his official duties, would be actionable.

Cucks v. *Starre*, Cro. Car. 285.

Tighe v. *Wicks*, 33 Upper Canada, Q. B. Rep. 470.

To charge a clergyman with immorality and misappropriation of the sacrament money is clearly actionable. Damages £750.

Highmore v. *Earl and Countess of Harrington*, 3 C. B. N.S. 142.

And, of course, to charge a clergyman with having indecently assaulted a woman on the highway is actionable.

Evans v. *Gwyn*, 5 Q. B. 844.

[*75] To say of a beneficed clergyman that he drugged the wine he gave the speaker, and so fraudulently induced him to sign a bill of exchange for a large amount, is actionable without proof of special damage; but it is not actionable merely to say of a beneficed clergyman, "He pigeoned me."

Pemberton v. *Colls*, 10 Q. B. 461; 16 L. J. Q. B. 403; 11 Jur. 1011.

To charge a clergyman with incontinence is not actionable, unless he hold some benefice or preferment, or some post of emolument, such as preacher, curate, chaplain, or lecturer.

Galloway v. *Marshall*, 9 Exch. 294; 23 L. J. Ex. 78; 2 C. L. R. 399.

To say of one who had been a linendraper, but at time of publication was a dissenting minister, that he was guilty of fraud and cheating when a linendraper, is no slander of the plaintiff in his office of dissenting minister.

Hopwood v. *Thorn*, 8 C. B. 293; 19 L. J. C. P. 94; 14 Jur. 87.

To say of a bishop that "he is a wicked man," is actionable without special damage. Per Scroggs, J., in *Townshend* v. *Dr. Hughes*, 2 Mod. 160. But this is only because the Statute of Scandalum Magnatum, 2 Rich. II. st. 1. c. 5, expressly mentions "prelates." See *post*, p. 135, and note to 10 Q. B. p. 469.

Barristers-at-Law.

It is quite clear that barristers and physicians may sue for words touching them in their profession, although their fees are honorary. The loss of a gratuity is special damage: see *post*, c. X. p. 300.

Illustrations.

The plaintiff was a barrister and gave counsel to divers of the king's subjects. The defendant said to J. S. [the plaintiff's father-in-law], concerning the plaintiff, "He is a dunce, and will get little by the law." J. S. replied, "Others have a better opinion of him." The defendant answered, "He was never but accounted a dunce in the Middle Temple." *Held*, that the words were actionable, though no special damage was alleged. Damages, one hundred marks.

Peard v. *Jones*, Cro. Car. 382.

So it is actionable to say of a barrister—

"Thou art no lawyer ; thou canst not make a lease; thou hast that degree without desert ; they are fools who come to thee for law."

Bankes v. *Allen*, 1 Roll. Abr. 54.

Or, "He hath as much law as a Jackanapes." (N. B.—The words are not "*no more* law *than* a Jackanapes.")

Palmer v. *Boyer*, Owen, 17 ; Cro. Eliz. 342, cited with approval in *Broke's Case*, Moore, 409.

[And see *Cawdrey* v. *Tetley*, Godb. 441, where it is said that had the words been, "He has no more *wit* than a Jackanapes," no action would have lain ; wit not being essential to success at the bar, according to F. Pollock, 2 Ad. & E. 4.]

Or, "He has deceived his client, and revealed the secrets of his cause."

Snag v. *Gray*, 1 Roll. Abr. 57 ; Co. Entr. 22.

[*76] *Or*, "He will give vexatious and ill counsel, and stir up a suit and milk her purse, and fill his own large pockets."

King v. *Lake*, 2 Ventr. 28 ; Hardres, 470.

Solicitors and Attornies.

It is actionable without special damage :—

To say of an attorney, "He is a very base rogue and a cheating knave, and doth maintain himself, his wife and children, by his cheating."

Anon. (1638), Cro. Car. 516.

See *Jenkins* v. *Smith*, Cro. Jac. 586.

To say of an attorney that "he hath the falling sickness ; " for that disables him in his profession.

Taylor v. *Perr* (1607), 1 Rolle's Abr. 44.

To say of an attorney, "What, does he pretend to be a lawyer? He is no more a lawyer than the devil ; " or any other words imputing gross ignorance of law.

Day v. *Buller*, 3 Wils. 59.

Baker v. *Morfue*, Sid. 327; 2 Keb. 202 ; *ante*, p. 70.

Powell v. *Jones*, 1 Lev. 297, *ante*, p. 70.

To say of an attorney, "He is only an attorney's clerk, and a rogue ; he is no attorney," or any words imputing that he is not a fully qualified practitioner.

Hardwick v. *Chandler*, 2 Stra. 1138.

To say of an attorney, "He is an *ambidexter*," *i.e.*, one who being retained by one party in a cause, and having learnt all his secrets, goes over to the other side, and acts for the adversary. Such conduct was subject for a *qui tam* action under an old penal statue : see Rastell's Entries, p. 2, Action sur le case vers Attorney, 3.

Annison v. *Blofield*, Carter, 214 ; 1 Roll. Abr. 55.

Shire v. *King*, Yelv. 32.

To impute that he will betray his clients' secrets and overthrow their cause.

Martyn v. *Burlings*, Cro, Eliz. 589.

Garr v. *Selden*, 6 Barb. (N. Y.), 416 ; 4 Comst. 91.

Foot v. *Brown*, 8 Johns. 64.

To charge an attorney with barratry, champerty, or maintenance.

Boxe v. *Barnaby*, 1 Roll. Abr. 55 ; Hob. 117.

Proud v. *Hawes*, Cro. Eliz. 171 ; Hob. 140.

Taylor v. *Starkey*, Cro. Car. 192.

To say to a client "your attorney is a bribing knave, and hath taken twenty pounds of you to cozen me."

Yardley v. *Ellis*, Hob. 8.

To say of an attorney, "He stirred up suits, and once promised me, that if he did not recover in a cause for me, he would take no charges of me ; " "because stirring up suits is barratry, and undertaking a suit, no purchase no pay, is maintenance."

Smith v. *Andrews*, 1 Roll. Abr. 54 ; Hob. 117.

To assert that an attorney has been guilty of professional misconduct and ought to be struck off the rolls.

Byrchley's Case, 4 Rep. 16.

Phillips v. *Jansen*, 2 Esp. 624.
Wartin v. *Gearing*, 1 Vict. L. R. C. L. 122.

[* 77] But it is not actionable to say of an attorney, "He has defrauded his creditors and has been horse-whipped off the course at Doncaster;" for it is no part of his professional duties to attend horse-races, and his creditors are not his clients.

Doyley v. *Roberts*, 3 Bing. N. C. 835; 5 Scott, 40; 3 Hodges, 154.

Nor to abuse him in general terms, such as "cheat," "rogue," or "knave;" though to say, "You cheat your clients," would be actionable.

Alleston v. *Moor*, Het. 167.
And see *Bishop* v. *Latimer*, 4 L. T. 775.

Physicians and Surgeons.

Any words imputing to a practising medical man misconduct or incapacity in the discharge of his professional duties are actionable *per se.*

Illustrations.

Thus it is actionable without proof of special damage:—

To accuse any physician, surgeon, accoucheur, midwife, or apothecary, with having caused the death of any patient through his ignorance or culpable negligence.

Poe v. *Mondford*, Cro. Eliz. 620.
Watson v. *Vanderlash*, Hetl. 71.
Southee v. *Denny*, 1 Exch. 196; 17 L. J. Ex. 151.
Edsall v. *Russell*, 4 M. & Gr. 1090; 12 L. J. C. P. 4; 5 Scott, N. R. 801; 2 Dowl. N. S. 641; 6 Jur. 996.
Foster v. *Scripps*, 39 Mich. 376; 33 Amer. R. 403.

To call a practising medical man "a quack-salver," or "an empirie," or a "mountebank."

Allen v. *Eaton*, 1 Roll. Abr. 54.
Goddart v. *Haselfoot*, 1 Viner's Abr. (S. a), pl. 12; 1 Roll. Abr. 54.

To say of a surgeon to his patient, "I wonder you had him to attend you. Do you know him? He is not an apothecary; he has not passed any examination; he is a bad character; none of the medical men here will meet him. Several persons have died that he had attended, and there have been inquests held on them," was held actionable in

Southee v. *Denny*, 1 Exch. 196; 17 L. J. Ex. 151.

The Court, in this case, inclined to think the words, "He is a bad character; none of the medical men here will meet him," were actionable by themselves.

But see *Clay* v. *Roberts*, 9 Jur. N. S. 580; 11 W. R. 649; 8 L. T. 397.
Ramadge v. *Ryan*, 9 Bing. 333; 2 M. & Sc. 421.

To charge any medical man or apothecary with either ignorantly or unskilfully administering the wrong medicines or in excessive doses.

Collier, M. D. v. *Simpson*, 5 C. & P. 73.
Tutty v. *Alewin*, 11 Mod. 221.
Secor v. *Harris*, 18 Barb. 425.
Carroll v. *White*, 33 Barb. 615; 42 N. Y. 161.
March v. *Davison*, 9 Paige, 580.

[*78] But it is not actionable *per se*:—

To say of a surgeon, "He did poison the wound of his patient"; without some averment that this was improper treatment of the wound; for else "it might be for the cure of it."

Suegoe's Case, Hetl. 175.

To call a person who practises medicine without full legal qualification "a quack," or "an impostor"; for the law only protects *lawful* employments.

Collins v. *Carnegie*, 1 A. & E. 695; 3 N. & M. 703.

To charge a physician with adultery unconnected with his professional conduct. It would be otherwise if he had been accused of seducing, or [committing adultery with, one of his patients.

Ayre v. *Craven*, 2 A. & E. 2; 4 N. & M. 220.

To charge a physician or surgeon generally with "malpractice"; not stating that he caused his patient's death by malpractice.

Rodgers v. *Kline*, 56 Miss. 808; 31 Amer. R. 389.

To say of an "accoucheuse," "A lady who has established a medical college at ——— has issued a prospectus, in which my name appears as president. I have sanctioned the issue of no prospectus with my name in it. I wish to know what remedy I have," was held no slander on her in the way of her trade.

Brent v. *Spratt*, *Times*, Feb. 3rd, 1882.

Dawes intended to employ the plaintiff, a surgeon and accoucheur, at his wife's approaching confinement; but the defendant told Dawes that the plaintiff's female servant had had a child by the plaintiff: Dawes consequently decided not to employ the plaintiff: Dawes told his mother and his wife's sister what defendant had said: and consequently the plaintiff's practice fell off considerably among Dawes' friends and acquaintances and others. The fee for one confinement was a guinea. *Held*, that the action lay, special damage being proved; that the plaintiff was entitled to more than the one guinea damages; that the jury should give him such sum as they considered Dawes' custom was worth to him; but that the jury clearly could not in this action give him any thing for the general decline of his business.

Dixon v. *Smith*, 5 H. & N. 450; 29 L. J. Ex. 125.

So, to impute incompetency to any one practising an art, as a dentist, a schoolmaster, a land surveyor, or an architect, is actionable *per se*

Illustrations.

Thus, it is actionable without proof of special damage:—

To say of a schoolmaster, "Put not your son to him, for he will come away as very a dunce as he went."

Watson v. *Vanderlash*, Hetl. 71.

Or to accuse a schoolmaster of *habitual* drunkenness.

Hume v. *Marshall*, 42 J. P. 136.

Brandrick v. *Johnson*, 1 Vict. L. R. C. L. 306.

Or to say of an architect engaged to restore a church, that he has no experience in church work.

Botterill and another v. *Whytehead*, 41 L. T. 588.

[*79] Or to say of a land surveyor, in the way of his trade, "Thou art a cozener and a cheating knave, and that I can prove."

London v. *Eastgate*, 2 Rolle's Rep. 72.

But it has actually been held not actionable to impute prostitution to a schoolmistress.

Wetherhead v. *Armitage*, 2 Lev. 233; 2 Show, 18; Freem. 277; 3 Salk. 328.

Per Twisden, J., in *Wharton* v. *Brook*. Ventr. 21; but see the remarks of Lord Denman, C. J., in *Ayre* v. *Craven*, 2 A. & E. 2; 4 N. & M. 220.

Traders.

So if the plaintiff carry on any trade recognized by the law, or be engaged in any lawful employment, however humble, an action lies for any words which prejudice him in the way of such trade or employment. But the words must relate to his trade or employment, and "touch" him therein.

Illustrations.

Thus, it is actionable without proof of special damage:—

To say of a clerk or servant that he had "cozened his master."

Seaman v. *Bigg*, Cro. Car. 480.

Reginald's Case (1640), Cro. Car. 563.

To say of a gamekeeper that he trapped three foxes ; for that would be clearly a breach of his duties as gamekeeper.

Foulger v. *Newcomb*, L. R. 2 Ex. 327 ; 36 L. J. Ex. 169 ; 15 W. R. 1181 ; 16 L. T. 595.

To say of a servant girl that she had had a miscarriage and had lost her place in consequence.

Connors v. *Justice*, 13 Ir. C. L. R. 451.

To say to the mistress of a servant girl, "you are not aware, Mrs. C., what kind of a girl you have in your service ; if you were, you would not keep her, for I can assure you she is often out with our married man." Coltman, J., held that these words were actionable without proof of special damage ; and on a motion for a new trial, Tindal, C. J., said, "The words are actionable, inasmuch as they are spoken of the plaintiff in her vocation."

Rumsey v. *Webb et ux.* 11 L. J. C. P. 129 ; Car. & M. 104.

To say to an innkeeper, "Thy house is infected with the pox, and thy wife was laid of the pox ;" for even if small-pox only was meant, still "it was a discredit to the plaintiff, and guests would not resort" to his house. Damages £50.

Levet's Case, Cro. Eliz. 289.

And see the remarks of Kelly, C. B., in *Riding* v. *Smith*, 1 Ex. D. 94 ; 45 L. J. Ex. 281 ; 24 W. R. 487 ; 34 L. T. 500.

But it is not actionable *per se* :—

To say of a livery-stable keeper, "You are a regular prover under bank-
[*80] ruptcies, a regular bankrupt maker ;" for it is not a charge against him in the way of his trade.

Angle v. *Alexander*, 7 Bing. 119 ; 1 Cr. & J. 143 ; 4 M. & P. 870 ; 1 Tyrw. 9.

Nor to say to a clerk to a gas company, "You are a fellow, a disgrace to the town, unfit to hold your situation for your conduct with whores."

Lumby v. *Allday*, 1 C. & J. 301 ; 1 Tyrw. 217.

And see *James* v. *Brook*, 9 Q. B. 7 ; 16 L. J. Q. B. 17 ; 10 Jur. 541.

Nor to impute to a staymaker that his trade is maintained by the prostitution of his shopwoman.

Brayne v. *Cooper*, 5 M. & W. 249.

But see *Riding* v. *Smith*, 1 Ex. D. 91 ; 45 L J. Ex. 281 ; 24 W. R. 487 ; 34 L. T. 500.

The law guards most carefully the credit of all merchants and traders ; any imputation on their solvency, any suggestion that they are in pecuniary difficulties, or are attempting to evade the operation of any Bankruptcy Act, is therefore actionable *per se*.

Illustrations.

Thus, it is actionable without proof of special damage :—

To impeach the credit of any merchant or tradesman by imputing to him bankruptcy or insolvency, either past, present or future.

Johnson v. *Lemmon*, 2 Rolle's Rep. 144.

Thompson v. *Trenge*, 2 Rolle's Rep. 433.

Vivian v. *Willet*, Sir Thomas Raymond, 207 ; 3 Salk. 326.

Stanton v. *Smith*, 2 Ld. Raymond, 1480 ; 2 Str. 762.

Whittington v. *Gladwin*, 5 B. & C. 180 ; 2 C. & P. 146.

Robinson v. *Marchant*, 7 Q. B. 918 ; 15 L. J. Q. B. 134 ; 10 Jur. 156.

Harrison v. *Bevington*, 8 C. & P. 708.

Gostling v. *Brooks*, 2 F. & F. 76.

Brown v. *Smith*, 13 C. B. 596 ; 22 L. J. C. P. 151 ; 17 Jur. 807 ; 1 C. L. R. 4.

To say to a tailor, "I heard you were run away," *sc.* from your creditors.

Davis v. *Lewis*, 7 T. R. 17.

And see *Dobson* v. *Thornistone*, 3 Mod. 112.

Chapman v. *Lamphire*, 3 Mod. 155.

Arne v. *Johnson*, 10 Mod. 111.
Harrison v. *Thornborough*, 10 Mod, 196; Gilb. Cas. 114.

To say of a brewer that he had been arrested for debt. And this although no express reference to his trade was made at time of publication, for such words must necessarily affect his credit therein.

Jones v. *Littler*, 7 M. & W. 423; 10 L. J. Ex. 171.

To assert that the plaintiff had once been bankrupt in another place, when carrying on another trade; for that may still affect him here in his present trade.

Leycroft v. *Dunker*, Cro. Car. 317.
Hall v. *Smith*, 1 M. & S. 287.
Figgins v. *Cogswell*, 3 M. & S. 369.

[*81] To say of any trader, "He is not able to pay his debts."

Drake v. *Hill*, Sir T. Raym. 184; 2 Keble, 549; 1 Lev. 276; Sid. 424.
Hooker v. *Tucker*, Holt, 39; Carth. 330.
Morris v. *Langdale*, 2 Bos. & Pul. 284.
Orpwood v. *Barkes* (vel *Parkes*), 4 Bing. 261; 12 Moore, 492.

To say of a farmer, "He cannot pay his labourers."

Barnes v. *Holloway*, 8 T. R. 150.

To impute insolvency to an innkeeper, even though at that date innkeepers were not subject to the bankruptcy laws.

Whittington v. *Gladwin* (1825), 5 B. & C. 180; 2 C. & P. 146.
Southam v. *Allen*, Sir T. Raym. 231.

But it is not actionable to say merely, "A. owes me money," if no words be added imputing that A. is *unable* to pay the debt.

Per Bramwell, B., 4 F. & F. 321, 322.

So if the defendant's words impute to the plaintiff dishonesty and fraud in the conduct of his trade, such as knowingly selling inferior articles as superior, or wilfully adulterating his wares, they will be actionable *per se*. Though all *bonâ fide* complaints by a customer of the goods supplied to him are of course privileged. (*Crisp* v. *Gill*, 29 L. T. (Old S.) 82; *Oddy* v. *Lord Geo. Paulet*, 4 F. & F. 1009.) If the words merely impugn the goods the plaintiff sells, they are not actionable unless they fall within the rules relating to Slander of Title, *post*, p. 147; for they are but an attack on a thing, not on a person. (*Fenn* v. *Dixe* (1638), 1 Roll. Abr. 58; *Evans* v. *Harlow*, 5 Q. B. 624; 13 L. J. Q. B. 120; *Harman* v. *Delany*, 2 Str. 898; Fitz. 121; 1 Barnard. 289, 438.) But often an attack on a commodity may be also an indirect attack upon its vendor; *e. g.*, if fraud or dishonesty be imputed to him in offering it for sale. (See *Jenner* v. *A'Beckett*, L. R. 7 Q. B. 11; 41 L. J. Q. B. 14; 20 W. R. 181; 25 L. T. 464; *Burnet* v. *Wells*, (1700), 12 Mod. 420; *Clark* v. *Freeman*, 11 Beav. 112; 17 L. J. Ch. 142; 12 Jur. 149.)

[*Illustrations.*

Thus, it is actionable without proof of special damage:—

To say of a trader, "He is a cheating knave, and keeps a false debt-book."

Crawfoot v. *Dale*, 1 Vent. 263; 3 Salk. 327.
Overruling *Todd* v. *Hastings*, 2 Saund. 307.

Or that he uses false weights or measures.

Griffiths v. *Lewis*, 7 Q. B. 61; 14 L. J, Q. B. 197; 9 Jur. 370; 8 Q. B. 841; 15 L. J. Q. B. 219; 10 Jur. 711.
Bray v. *Ham*, 1 Brownlow & Golds. 4.
Stober v. *Green*, ib. 5.
Prior v. *Wilson*, 1 C. B. N. S. 95.

[* 82] To say to a cornfactor, "You are a rogue and a swindling rascal, you delivered me 100 bushels of oats, worse by 6*s.* a bushel than I bargained for."

Thomas v. *Jackson*, 3 Bing. 104; 10 Moore, 425.

To say of a tradesman that he adulterates the goods he sells.

Jesson v. *Hayes* (1636), Roll. Abr. 63.

To say of a contractor, "He used the old materials," when his contract was for new, is actionable, with proper innuendoes.

Baboneau v. *Farrell*, 15 C. B. 360; 24 L. J. C. P. 9; 1 Jur. N. S. 114: 3 C. L. R. 142.

Sir R. Greenfield's Case, Mar. 82; 1 Viner's Abr. 465.

See *Smith* v. *Mathews*, 1 Moo. & Rob. 151.

To say of an auctioneer or appraiser who had valued goods for the defendant, "He is a damned rascal, he has cheated me out of £100 on the valuation."

Bryant v. *Loxton*, 11 Moore, 344.

Ramsdale v. *Greenacre*, 1 F. & F. 61, *ante*, p. 69.

To say of a butcher that he changed the lamb bought of him for a coarse piece of mutton.

Crisp v. *Gill*, 29 L. T. (Old S.) 82.

Rice v. *Pidgeon*, Comb. 161.

But to call a tradesman "a rogue," or "a cheat," or "a cozener," is *not* actionable, unless it can be shown that the words refer to his trade. To impute distinctly that he cheats or cozens *in his trade* is actionable.

Johns v. *Gittings*, Cro. Eliz. 239.

Cotes v. *Ketle*, Cro. Jac. 204.

Terry v. *Hooper*, 1 Lev. 115.

Savage v. *Robery*, 5 Mod. 398; 2 Salk. 694.

Surman v. *Shelleto*, 3 Burr. 1688.

Bromefield v. *Snoke*, 12 Mod. 307.

Savile v. *Jardine*, 2 H. Bl. 531.

Lancaster v. *French*, 2 Stra. 797.

Davis v. *Miller et ux.*, 2 Stra. 1169.

Fellows v. *Hunter*, 20 Up. Can. Q. B. 382.

Brady v. *Youlden*, Melbourne Argus R., *ante*, p. 69.

[N.B.—*Lancaster* v. *French* appears to go a little further than the other cases cited: but if so, it must be taken to be so far overruled by them.]

So to say to a pork butcher, "Who stole Fraser's pigs? You did, you bloody thief, and I can prove it—you poisoned them with mustard and brimstone," was held not actionable (the jury having found that the words were not intended to impute felony): for there was nothing to show that they were spoken of the plaintiff in relation to his trade.

Sibley v. *Tomlins*, 4 Tyrwhitt, 90.

So to say of a grocer, "His shop is in the market," is not actionable, in the primary sense of the words at all events.

Ruel v. *Tatnell*, 29 W. R. 172; 43 L. T. 507.

It must be averred and proved that the plaintiff carried on his trade at the time the words were spoken; else the words cannot be spoken of him in the way of such trade. (*Bellamy* v. *Burch*, 16 M. & W. 590.) [*83] Moreover the trade or employment must be one recognized by the law as a legitimate means of earning one's living.

Illustrations.

A stock-jobber could not sue for words spoken of him in the way of his trade so long as that trade was illegal within the 7 Geo. II. c. 8. s. 1 (Sir John Barnard's Act; now repealed by 23 & 24 Vict. c 28).

Morris v. *Langdale*, 2 Bos. & Pul. 284.

Collins v. *Carnegie*, 1 A. & E. 695; 3 N. & M. 703,

If the plaintiff avers that he carries on two trades, it will be sufficient to prove that he carries on *one*, if the words affect him in that one.

Figgins v. *Cogswell*, 3 M. & S. 369.

Hall v. *Smith*, 1 M. & S. 287.

Where insolvency is imputed to one member of a firm, either he *or* the firm may sue, for it is a reflection on the credit of both.

Harrison v. *Bevington*, 8 C. & P. 808.
Cook and another v. *Batchellor*, 7 Bos. & Pul. 150.
Foster and others v. *Lawson*, 3 Bing. 452 ; 11 Moore, 360.

A married woman carrying on a separate trade, may sue without joining her husband for any tort affecting such separate trade or her credit therein.

Summers v. *City Bank*, L. R. 9 C. P. 580 ; 43 L. J. C. P. 261.
And see 45 & 46 Vict. c. 75, ss. 1, 12, *post*, pp. 395, 397.

IV. *Words actionable only by reason of Special Damage.*

No other words are actionable without proof of special damage. Thus, to accuse a man of fraud, dishonesty, immorality, or any vicious and dishonorable (but not criminal) conduct, is not actionable, unless it has produced as its natural and necessary consequence some pecuniary loss to the plaintiff.

Illustrations.

Thus the following words are not actionable without proof of special damage :—

"Thou art a scurvy bad fellow."
Fisher v. *Atkinson*, 1 Roll. Abr. 43.

"A rogue, a villain, and a varlet" (for these, and words of the like kind are to be considered as "words of heat"),
Per cur. in *Stanhope* v. *Blith*, 4 Rep. 15.

[*84] "A runagate rogue."
Cockaine v. *Hopkins*, 2 Lev. 214.

"A common filcher."
Goodale v. *Castle*, Cro. Eliz. 554.

"A cozening knave."
Brunkard v. *Segar*, Cro. Jac. 427 ; Hutt. 13 ; 1 Vin. Abr. 427.

"A liar."
Kimmis v. *Stiles*, 44 Vermont, 371.

"A cheat."
Savage v. *Robery*, 2 Salk. 694 ; 5 Nod. 398.

"You are a swindler."
Saville v. *Jardine*, 2 H. Bl. 531.
Black v. *Hunt*, 2 L. R. Ir. 10.

"He is a rogue and a swindler ; I know enough about him to hang him."
Ward v. *Weeks*, 7 Bing. 211 ; 4 M. & P. 796.

"He is a rogue, and has cheated his brother-in-law of upwards of £2,000."
Hopwood v. *Thorn*, 8 C. B. 293 ; 19 L. J. C. P. 94 ; 14 Jur. 87.

"Thy credit hath been called in question, and a jury being to pass upon it, thou foistedst in a jury early in the morning ; and the lands thou hast are gotten by lewd practices."
Nichols v. *Badger*, Cro. Eliz. 348.

"This gentlemen has defrauded us of £22,000."
Needham v. *Dowling*, 15 L. J. C. P. 9.
Richardson v. *Allen*, 2 Chit. 657.

"The conduct of the plaintiffs was so bad at a club in Melbourne, that a round robin was signed urging the committee to expel them ; as, however, they were there only for a short time, the committee did not proceed further."
Chamberlain v. *Boyd* (C. A.), 11 Q. B. D. 407 ; 52 L. J. Q. B. 277 ; 31 W. R. 572 ; 48 L. T. 328 ; 47 J. P. 372.

"I have seen the plaintiff ; and from what I have seen and heard, I think it is my duty to urge you" (plaintiff's husband) "to send for one or two doctors to see her ; some opinion ought to be taken as to the state of her mind."

Weldon v. *DeBathe*, 33 W. R. 328.

To say "You cheat everybody, you cheated me, you cheated Mr. Saunders," is not actionable unless it be spoken of the plaintiff in the way of his profession or trade.

Davis v. *Miller et ux.*, 2 Stra. 1169.

Lucas v. *Flinn*, 35 Iowa, 9.

To call a man a "blackleg" is not actionable unless it can be shown that word was understood by the bystanders to mean "a cheating gambler liable to be prosecuted as such."

Barnett v. *Allen*, 3 H. & N. 376; 4 Jur. N. S. 488; 27 L. J. Ex. 412; 1 F. & F. 125.

In an American case the difficulty caused by absence of special damage was surmounted by suing in trespass:—A man who, instead of walking along the street, stops on the pavement opposite the plaintiff's freehold shop using insulting and abusive language towards the plaintiff, and persists in such conduct, though requested to move on, is a trespasser, and the jury in such an action of trespass may award substantial damages, though no special damages be proved, and although the abusive words be not actionable *per se*. (*Adams* v. *Rivers*, 11 [*85] Barbour (New York) Reports, 390.) For as one of the public he was only entitled to use the highway for passing and repassing. (*Dovaston* v. *Paine*, 2 Sm. L. Cas. (8th. ed.) p. 142.) And evidence of his language while committing a trespass is properly admitted to show in what spirit the act was done. (*Merest* v. *Harvey*, 5 Taunt. 442.) "Where a wrongful act is accompanied by words of contumely and abuse, the jury are warranted in taking that into consideration and giving retributory damages." Per. Byles, J., in

Bell v. *Midland Rail. Co.*, 10 C. N. S. 287, 308; 30 L. J. C. P B. 273; 9 W. R. 612; 4 L. T. 293.

Words imputing adultery, profligacy, immoral conduct, &c., even when spoken of one holding an office or carrying on a profession or business, will not be actionable, unless they "touch him" in that office, profession, or business. Thus, if alleged of a beneficed clergyman they will be actionable, because if the charge were true it would be ground for degradation or deprivation, as it would prove him unfit to hold his benefice or to continue in the active duties of his profession. (*Gallwey* v. *Marshall*, 9 Ex. 294; 23 L. J. Ex. 78.) But if the same words were spoken of a trader, or even of a physician or a schoolmistress, they would not be actionable without proof of special damage, as they do not necessarily affect the plaintiff in relation to his trade or profession. The imputation must be connected with the professional duties of the plaintiff.

Illustrations.

Words imputing adultery to a physician were laid to have been spoken "of him in his profession," but there was nothing in the declaration to connect the imputation with the plaintiff's professional conduct. *Held*, that the words were not actionable without special damage.

Ayre v. *Craven*, 2 A. & E. 2; 4 N. & M. 220.

To impute prostitution to a schoolmistress is not actionable *per se*. Per Twisden, J., in

Wharton v. *Brook*, Ventr. 21.

Wetherhead v. *Armitage*, 2 Lev. 233; 2 Show. 18; Freem. 277; 3 Salk. 328.

And words imputing immorality to a trader or his clerk are not actionable without special damage.

Lumby v. *Allday*, 1 Cr. & J. 301; 1 Tyrw. 217.

Nor are words imputing to a staymaker that his trade is maintained by the prostitution of his shopwoman.

Brayne v. *Cooper*, 5 M. & W. 249.

But now see *Riding* v. *Smith*, 1 Ex. D. 91; 45 L. J. Ex. 281; 24 W. R. 487; 34 L. T. 500.

[*86] Words imputing unchastity or adultery to a woman, married or unmarried, however gross and injurious they may be, are not actionable, unless she can prove that they have directly caused her special damage.

As to what constitutes special damage, see the stringent rules laid down in c. X., *post*, pp. 297—306.

The only exception is in the case of actions brought in the local Courts of the city of London, the borough of Southwark (Sid. 97), and, it is said, of the city of Bristol (*Power* v. *Shaw*, 1 Wils. 62), for words spoken within the jurisdiction of those Courts. It was formerly the custom in those localities to cart and whip whores, tingling a basin before them. Hence to call a woman "whore" or "strumpet" (*Cook* v. *Wingfield*, 1 Str. 555), or "bawd" (1 Vin. Abr. 396), or her husband a "cuckold" (*Vicars* v. *Worth*, 1 Str. 471), was supposed to be an imputation of a criminal offence to the female plaintiff and therefore actionable. But no action will lie in the High Court of Justice for such words, since the custom has never been certified by the Recorder and must therefore be strictly proved. The plaintiffs failed to prove such a custom in 1782 in *Stainton et ux.* v. *Jones*, 2 Selw. N. P. 1205 (13 ed.); and it would be still more difficult to do so in the present day. The City Courts used formerly to take judicial notice of their own custom; but I doubt if they would do so now, the custom being entirely extinct. (See *Oxford et ux.* v. *Cross* (1599), 4 Rep. 18; *Hassell* v. *Capcot* (1639), 1 Vin. Abr. 395; 1 Roll. Abr. 36; *Cook* v. *Wingfield*, 1 Str. 555; *Watson* v. *Clerke*, Comb. 138, 139; notes [14] and [96] to 1 Dougl. by Frere, p. 380; *Theyer* v. *Eastwick*, 4 Burr. 2032; *Brand and wife* v. *Roberts and wife*, 4 Burr. 2418; *Rily* v. *Lewis*, 1 Vin. Abr. 396: *Vicars* v. *Worth*, 1 Str. 471; *Hodgkins et ux.* v. *Corbet et ux.*, 1 Str. 545; *Roberts* v. *Herbert*, Sid. 97; S. C. nom. *Caus* v. *Roberts*, 1 Keble, 418.)

Illustrations.

To say of a young woman that she had a bastard is not actionable without proof of special damage; "because it is a spiritual defamation, punishable in the spiritual court."

Per Holt, C. J., in *Ogden* v. *Turner*, Holt, 40; 6 Mod. 104; 2 Salk. 696.

Dwyer v. *Meehan*, 18 L. R. Ir. 138, *post*, p. 301.

To call a woman "a whore" or "a strumpet" is not actionable, except by special custom, if the action be tried in the cities of London and Bristol. "To maintain actions for such brabling words is against law."

Oxford et ux. v. *Cross* (1599), 4 Rep. 18.

Gascoigne et ux. v. *Ambler*, 2 Ld. Raym. 1004.

Power v. *Shaw*, 1 Wils. 62 (Bristol).

[*87] It is not actionable to call a woman a "bawd,"

Hollingshead's Case (1632), Cro. Car. 229;

Hixe v. *Hollingshead* (1632), Cro. Car. 261;

unless it be in the City of London.

Rily v. *Lewis* (1640), 1 Vin. Abr. 396.

The words "You are living by imposture; you used to walk St. Paul's churchyard for a living,"—spoken of a woman with the intention of imputing

that she was a swindler and a prostitute,—are not actionable without special damage.

Wilby v. *Elston*, 8 C. B. 142; 18 L. J. C. P. 320; 13 Jur. 706; 7 D. & L. 143.

So to say of a married man that he has "had two bastards and should have kept them," is not actionable, though it is averred that by reason of such words "discord arose between him and his wife, and they were likely to have been divorced."

Barmund's Case, Cro. Jac. 473.

Salter v. *Browne*, Cro. Car. 436; 1 Roll. Abr. 37.

The defendant told a married man that his wife was "a notorious liar" and "an infamous wretch," and had been all but seduced by Dr. C. of Roscommon before her marriage. The husband consequently refused to live with her any longer. *Held*, no action lay.

Lynch v. *Knight and wife*, 9 H. L. C. 577; 8 Jur. N. S. 724; 5 L. T. 291.

Where the defendant asserted that a married woman was guilty of adultery, and she was consequently expelled from the congregation and bible society of her religious sect, and was thus prevented from obtaining a certificate, without which she could not become a member of any similar society, *held*, no action lay.

Roberts and wife v. *Roberts*, 5 B. & S. 384; 33 L. J. Q. B. 249; 10 Jur. N. S. 1027; 12 W. R. 909; 10 L. T. 602.

Shafer v. *Ahalt*, 48 Maryland, 171; 30 Amer. R. 456.

[It does not appear that the case as to excommunication, *Barnabas* v. *Traunter*, 1 Vin. Abr. 396, *ante*, p. 61, was cited to the Court.]

The defendant falsely imputed incontinence to a married woman. In consequence of his words she lost the society and friendship of her neighbours, and became seriously ill and unable to attend to her affairs and business, and her husband incurred expense in curing her, and lost the society and assistance of his wife in his domestic affairs. *Held*, that neither husband nor wife had any cause of action.

Allsop and wife v. *Allsop*, 5 H. & N. 534; 29 L. J. Ex. 315; 8 W. R. 449; 6 Jur. N. S. 433; 36 L. T. (Old S.) 290.

But see *Dalies* v. *Solomon*, L. R. 7 Q. B. 112; 41 L. J. Q. B. 10; 20 W. R. 167; 25 L. T. 799; *post*, p. 335.

Riding v. *Smith*, 1 Ex. D. 91; 45 L. J. Ex. 281; 24 W. R. 487; 34 L. T. 500; *post*, p. 92.

Our law on this point has often been denounced by learned judges. "I may lament the unsatisfactory state of our law according to which the imputation by words however gross, on an occasion however public, upon the chastity of a modest matron or a pure virgin, is not [*88] actionable without proof that it has actually produced special temporal damage to her," says Lord Campbell, L. C., in *Lynch* v. *Knight and wife*, 9 H. L. C. 593; 5 L. T. 291. "Instead of the word 'unsatisfactory' I should substitute the word 'barbarous,'" says Lord Brougham, p. 594. See also the remarks of Willes, C. J., in *Jones* v. *Herne*, 2 Wils. 87; and of Cockburn, C. J., Crompton and Blackburn, JJ., in *Roberts and wife* v. *Roberts*, 5 B. & S. 384; 33 L. J. Q. B. 249; 10 Jur. N. S. 1027; 12 W. R. 909; 10 L. T. 602.

Two explanations may be assigned for the undesirable state of our law on this point. (1) In the days when our common law was formed, every one was much more accustomed than they are at present to such gross language, and epithets such as "whore" were freely used as general terms of abuse without seriously imputing any specific act of unchastity. (2) The spiritual Courts had

jurisdiction over such charges, and though they could not award damages to the plaintiff, they could punish the defendant for the benefit of his soul ; but all actions in the Ecclesiastical Courts for defamatory words were abolished by the 18 & 19 Viet. c. 41, and no attempt was made to substitute any remedy in the ordinary Courts of law. In Scotland a verbal imputation of unchastity is actionable without proof of special damage. Throughout the United States an imputation of unchastity to an unmarried female is actionable *per se* by statute : and so is an imputation of adultery to a married woman in all the States, except Maryland. (See *ante*, p. 57.) Even to charge a woman with being drunk is actionable in Massachusetts. (*Brown* v. *Nickerson*, 1 Gray, 1.)

The hardship is increased by the rules relating to special damage, which are peculiarly stringent in the case of a married woman. That her husband has sustained special damage in consequence of the words will not avail for her. And unless she carry on a separate trade or business of her own under the Married Women's Property Acts, it is almost impossible for her to sustain any special damage to herself, for all her property is either in law her husband's, or is safely vested in trustees for her, and cannot possibly be affected by defamatory words. That she loses the society of her friends is no special damage ; and in *Lynch* v. *Knight and wife*, 9 H. L. C. 577, Lord Wensleydale denied that the loss of the *consortium* of her husband could constitute special damage. The only object of insisting on proof of special damage is to secure that the plaintiff's reputation has in fact been seriously impaired. And in many of these cases it is clear that this was so. What more convincing proof of loss of reputation could be adduced than the fact proved by Mrs. Roberts that she was expelled from the congregation, and not allowed to continue a member of her [*89] religious sect. Yet in that case it was held no action lay. Surely it is high time that some alteration should be made in our law on this point.

All words, if published without lawful occasion, are actionable, if they have in fact produced special damage to the plaintiff, such as the law does not deem too remote. "Any words by which a party has a special damage" are actionable. (Comyn's Digest, Action upon the Case for Defamation, D. 30.) "Undoubtedly all words are actionable, if a special damage follows." (Per Heath, J., in *Moore* v. *Meagher*, 1 Taunt. 44.)

It is usual to qualify the generality of the above rule by adding a proviso, "provided the words themselves be in their nature defamatory." But I think the rule as expressed above is a correct proposition of law. And there are objections to the phrase "words in their nature defamatory." It is not defamatory to say of a pork butcher "he knows no law : he cannot draw a lease ;" it is defamatory so to speak of a solicitor. You can not therefore lay down *a priori* any hard and fast rule as to what words are in their nature defamatory, and what are not so. Each case must depend on its own circumstances. (See 6 Mod. 24.) And that is why "defamatory

words" have at the commencement of this chapter been defined as "words which in any given case have appreciably injured the plaintiff's reputation."

In an action of libel or slander, the words must of course be defamatory; that is, the plaintiff's reputation must have been appreciably impaired. And so, if we confine ourselves strictly to actions of defamation and to words not actionable *per se*, no doubt it is correct to state the rule thus:—"All words if published without lawful occasion, are actionable, if it be proved, by evidence of special damage not too remote, that they have in fact injured the plaintiff's reputation; and in such cases the action is called an action of defamation." And the converse of this rule will be equally correct:—"No words can be the subject of an action of defamation, however maliciously published, and although they have caused actual damage to the plaintiff, unless it is also proved that the plaintiff's reputation has in fact been thereby injured."

But though an action of defamation will not lie, it by no means follows that some other action will not lie. Wherever a defendant speaks words of whatever nature, maliciously intending to do some [*90] injury to the plaintiff thereby, and the words have their desired effect and do actually produce damage to the plaintiff, here there is that actionable "concurrence of loss and injury," spoken of by Lord Campbell, L. C., in *Lynch* v. *Knight and wife*, 9 H. L. C. 589; and an ordinary action on the case will lie, if not an action of libel or slander.

This no doubt is running counter to the head-note in *Kelly* v. *Partington*, 5 B. & Ad. 645: "Held that the words were not defamatory in their nature, and therefere not actionable, even though followed by special damage." But *Kelly* v. *Partington* is, if I may say so, a silly case. It turned on a slip in the pleadings. The defendant said of the plaintiff, "She secreted 1*s*. 6*d*. under the till," and then added significantly, "These are not times to be robbed." This was clearly an insinuating of felony. Verdict for the plaintiff, damages 1*s*. On taxation the master declined to allow the plaintiff more costs than damages, in accordance with the statute of James I., then in force. The plaintiff's counsel, Sir John Campbell, S. G., thereupon argued that the second count was not actionable without proof of special damage, and so that statute would not apply; and succeeded in getting a rule for his costs. For it turned out that the pleader had run the words together so that it appeared on the record that the charge against the plaintiff was this: "She secreted 1*s*. 6*d*. under the till; stating, these are not times to be robbed." There was no innuendo stating whose money it was, but there was an allegation of special damage that in consequence one Stenning had refused to take the plaintiff into his service. The Court was therefore pleased to take the words as spoken in praise of the plaintiff, *i. e.*, as importing merely that the plaintiff exercised great caution, and was very careful of her own money, even of small amounts of it, for fear of being robbed. Sir James Scarlett took advantage of this flaw and succeeded in arresting judgment. For it followed, of course, that Stenning's refusal to

take the plaintiff into his service, because the defendant had praised her, was unreasonable, and *not* the natural or necessary consequence of the defendant's words. And the only *decision* in the case was that the special damage was too remote ; and a very harsh decision this seems to be, in these days when pleadings are so easily amended. The Solicitor General could not now go back and argue that the words amounted to a charge of felony and were actionable *per se ;* for on the argument of the previous rule he had been only too successful in proving that the words were not actionable without proof of special damage. He was driven therefore to contend that, if praise produced special damage, praise was actionable ; an argu- [*91] ment with which the Court appeared much amused. Littledale, J., puts him a case (p. 648), "Suppose a man had a relation of a penurious disposition, and a third person knowing that it would injure him in the opinion of that relation, tells the latter a generous act which the first had done, by which he induces the relation not to leave him money, would that be actionable?" And Sir John Campbell answers, "If the words were spoken falsely with intent to injure, they would be actionable." And surely he is right ; though one sees the strange position the plaintiff would be compelled to adopt. He would have to come forward in Court and declare, "I am not generous, I am really very mean." It would be difficult also to prove the intent with which the words were spoken. But if a malicious intent be clear, the damage is not too remote, for the defendant contemplated it ; and the speaking of the words was wrongful because done maliciously, falsely, and with intent to injure the plaintiff ; so here is *et damnum et injuria.* Lord Denman's judgment, be it observed, turned almost entirely on the absence of any innuendo ; that of Taunton, J., on the remoteness of the damage ; while Littledale and Patteson, JJ., concurred in a proposition, which, with all submission, I cannot understand, that "to make the speaking of the words wrongful, they must in their nature be defamatory" (p. 651). If in a small country town where political or religious feeling runs very high, I maliciously disseminate a report, false to my knowledge, that a certain tradesman is a radical or a dissenter, knowing that the result will be to drive away his customers, and intending and desiring that result, then, if such result follows, surely I am liable for damages in an action on the case, if not in an action of slander. And yet such words are not in their nature defamatory ; for many, I understand, glory in such titles. This decision (or *dictum*) in *Kelly* v. *Partington*, was approved and adopted in *Sheahan* v. *Ahearne* (1875), Ir. Rep. 9 C. L. 412. But there, too, this was not the real ground of the judgment of the Court ; their decision turned on a variance between the words as pleaded and the evidence at the trial. In *Miller* v. *David*, L. R. 9 C. P. 126 ; 43 L. J. C. P. 84 ; 22 W. R. 332 ; 30 L. T. 58, on the other hand, the Court treat the point as still, at least, an open question :—"It is not necessary to consider the question which was suggested on the argument, whether words not in themselves actionable or defamatory, spoken under circumstances and to persons likely to create damage to the subject of the words, are, when

the damage follows, ground of action. The judgment of Lord Wensleydale in *Lynch* v. *Knight and wife*, 9 H. L. C. 600, appears in favour of the affirmative of this question. But it is not necessary for us, for the reasons given, to express any [* 92] opinion upon it." Again, in *Western Counties Manure Co.* v. *Lawes Chemical Manure Co.*, L. R. 9 Exch. 223 ; 43 L. J. Ex. 171 ; Pollock, B., cites with approval and acts upon "the general rule laid down as to such actions in Comyns' Digest, where it is said that an action lies when special damage is shown." So, too, in *Riding* v. *Smith*, 1 Ex. Div. 96, Huddleston, B., says, "The declaration when amended would stand thus : that the plaintiff carried on business as a grocer and draper, and was assisted in the conduct of his business by his wife, and that the defendant falsely and maliciously published of the plaintiff's wife in relation to the business that she had committed adultery, whereby the plaintiff was injured in his business and sustained special damage. I think it clear that on a declaration so framed an action might be maintained." The name of the wife as a party to the action had been previously struck out ; and the words were not defamatory of the husband, for they in no way refer to him. And in the same case (p. 94), Kelly, C. B., says, "Here the statement was that the wife of the plaintiff was guilty of adultery, and it is the natural consequence of such a statement that persons should cease to resort to the shop. Supposing the statement made not to be slander, but something else calculated to injure the shopkeeper in the way of his trade, as, for instance, a statement that one of his shopmen was suffering from an infectious disease, such as scarlet fever, this would operate to prevent people coming to the shop ; and whether it be slander or some other statement which has the effect I have mentioned, an action can, in my opinion, be maintained on the ground that it is a statement made to the public which would have the effect of preventing their resorting to the shop and buying goods of the owner." And see *Levet's case*, Cro. Eliz. 289, *ante*, p. 79 ; *Baldwin* v. *Flower*, 3 Mod. 120, *post*, p. 400.

I conclude, therefore, that if a defendant either knows or ought to know that certain special damage will follow from his words, and speaks those words, desiring and intending that such damage shall follow, or recklessly indifferent whether such damage follows or not therefrom, then if the words be false, and if such damage does in fact follow directly from their use, an action on the case will lie against him for such damage, whatever be the nature of the words. (*Barley* v. *Walford*, 9 Q. B. 197 ; 15 L. J. Q. B. 369 ; 10 Jur. 917, *ante*, p. 16 ; *Green* v. *Button*, 2 C. M. & R. 707, *post*, p. 145.)

CHAPTER III.

CONSTRUCTION AND CERTAINTY. [*93]

CONSTRUCTION is the correct interpretation of words, the giving them their true meaning, the method of ascertaining the sense in which they were understood by those who first heard or read them.

What meaning the speaker *intended* to convey is immaterial in all actions of defamation. (*Haire* v. *Wilson*, 3 B. & C. 645.) He may have spoken without any intention of injuring the plaintiff's reputation, but if he has in fact done so, he must compensate the plaintiff. He may have meant one thing and said another: if so, he is answerable for so inadequately expressing his meaning. If a man in jest conveys a serious imputation, he jests at his peril. (Per Smith, B., in *Donoghue* v. *Hayes* (1831), Hayes (Irish Exch.) at p. 266). Or he may have used ambiguous language which to his mind was harmless, but to which the bystanders attributed a most injurious meaning: if so he is liable for the injudicious phrase he selected. What was passing in his own mind is immaterial, save in so far as his hearers could preceive it at the time. Words cannot be construed according to the *secret* intent of the speaker. (*Hankinson* v. *Bilby*, 16 M. & W. 445; 2 C. & K. 440.) "The slander and the damage consist in the apprehension of the hearers." (*Per Cur. in Fleetwood* v. *Curley* (1619), Hobart, 268).

The question therefore is always: How did those to [*94] whom the words were originally published understand them? We must assume that they were persons of ordinary intelligence. We must assume, too, that they gave to ordinary English words their ordinary English meaning, to local or technical phrases their local and technical meaning. That being done, what meaning did the whole passage convey to an unbiased mind?

This is clearly rather a question for the jury than for the judge. And accordingly by the 32 Geo. III. c. 60 (Fox's Libel Act) it is expressly provided that in all criminal proceedings for libel, the jury are to decide the question of libel or no libel, subject to the direction of the judge. In civil proceedings for libel, the practice is, and always was, the same (*Baylis* v. *Lawrence*, 11 A. & E. 920; 3 Perry & D. 526; 4 Jur. 652), save that here if the judge thinks that the words cannot possibly bear a defamatory meaning, he may shorten the proceedings by a nonsuit. "It is only when the judge is satisfied that the publication *cannot* be a libel, and that, if it is found by the jury to be such, their verdict will be set aside, that he is justified in withdrawing the question from their cognizance." (Per Kelly, C. B., L. R. 4 Exch. 288; and see *Fray* v. *Fray*, 17 C.

B. N. S. 603 ; 34 L. J. C. P. 45 ; 10 Jur. N. S. 1153 ; *Teacy* v. *McKenna*, Ir. R. 4 C. L. 374 ; *Hunt* v. *Goodlake*, 43 L. J. C. P. 54 ; 29 L. T. 472 ; *Hart and another* v. *Wall*, 2 C. P. D. 146 ; 46 L. J. C. P. 227 ; 25 W. R. 373.)

If, however, the judge considers that words are reasonably susceptible of a defamatory meaning as well as an innocent one, it will then be a question for the jury which meaning the words would convey to ordinary Englishmen who heard or read them without any previous knowledge of the circumstances to which they relate. (*Fisher* v. *Clement*, 10 B. & C. 472 ; 5 Man. & Ry. 730 ; *Hankinson* v. *Bilby*, 16 M. & W. 442 ; 2 C. & K. 440.) The judge is in no way bound to state to the jury his own opinion on the point ; it would, in fact, be wrong for him to lay down as a matter of law, that the publication complained of was, [*95] or was not, a libel. (*Baylis* v. *Lawrence*, 11 A. & E. 920.) The proper course is for the judge to define what is a libel in point of law, and to leave it to the jury to say whether the publication in question falls within that definition. (*Parmieter* v. *Coupland and another*, 6 M. & W. 105 ; 9 L. J. Ex. 202 ; 4 Jur. 701.) And this is a question pre-eminently for the jury ; whichever way they find, the Court will not disturb the verdict, if the question was properly left to them.

So, too, in cases of slander, the judge usually decides whether the words are, or are not, actionable *per se*, and whether the special damage assigned is, or is not, too remote. If the defendant's words cannot reasonably bear the meaning ascribed to them by the innuendo, and the judge is clearly of opinion that the words without that meaning are not actionable, he will stop the case. So, too, if the words even with the alleged meaning are not actionable (though pleaders seldom err on that side). But in all other cases, where there is any reasonable doubt as to the true construction of the words, the judge leaves the question to the jury. All circumstances which were apparent to the bystanders at the time the words were uttered should be put in evidence, so as to place the jury as much as possible in the position of such bystanders ; and then it is for the jury to say what meaning such words would fairly have conveyed to their minds. And their finding is final and conclusive on the point ; the Court will not disturb the verdict, unless it be plainly perverse.

Formerly, however, the practice was very different. After a verdict for the plaintiff, the defendant constantly moved in arrest of judgment, on the ground that a defamatory meaning was not shown on the record with sufficient precision, or, as it soon came to be, on the ground that it was just possible, in spite of the record, to give the words an innocent construction. For it was said to be a maxim that words were to be taken *in mitiori sensu* whenever there were two senses in which they could be taken. And in these early times the Courts thought it their duty to discourage actions of [*96] slander. They would, therefore, give an innocent meaning to the words complained of, if by any amount of legal ingenuity such a meaning could be put upon them ; and would altogether disregard

the plain and obvious signification which must have been conveyed to bystanders ignorant of legal technicalities. Thus where a married woman falsely said, "You have stolen my goods," and the jury found a verdict for the plaintiff, the Court entered judgment for the defendant, on the ground that a married woman could have no goods of her own, and that therefore the words conveyed no charge of felony. (*Anon.*, Pasch. 11 Jac. I. ; 1 Roll. Abr. 746; now overruled by *Stamp and wife* v. *White and wife*, Cro. Jac. 600.) Again, where the words complained of were, "He hath delivered false evidence and untruths in his answer to a bill in Chancery," it was held that no action lay ; for though every answer to a bill in Chancery was an oath, and was a judicial proceeding, still in most Chancery pleadings "some things are not material to what is in dispute between the parties," and "it is no perjury, although such things are not truly answered!" (*Mitchell* v. *Brown*, 3 Inst. 167 ; 1 Roll. Abr. 70.) For further instances of such refinements, see *Peake* v. *Pollard*, Cro. Eliz. 214; *Cox* v. *Humphrey*, *ib.* 889 ; and *Holland* v. *Stoner*, Cro. Jac. 315.

But in the days of Charles II., the Court of Common Pleas decided in a case of *scandalum magnatum* (*Lord Townshend* v. *Dr. Hughes* (1676), 2 Mod. 159) that "words should not be construed either in a rigid or mild sense, but according to the general and natural meaning, and agreeable to the common understanding of all men." And this decision soon became law. In *Naben* v. *Miecock* (1683), Skin. 183, Levinz, J., said he was "for taking words in their natural, genuine and usual sense and common understanding, and not according to the witty construction of lawyers, but according to the apprehension of the bystanders." (And see *Somers* v. *House*, Holt, 39; Skin. 364 ; and *Burgess* v. *Bracher*, 8 Mod. 238.) In 1722, Fortescue, J., declared in *Button* v. *Hayward et ux.* (8 Mod. 24), "The maxim for expounding words *in mitiori sensu* has for a great while been exploded, near fifty or sixty years." In *Peake* v. *Oldham* (Cowp. 277, 278) Lord Mansfield commented severely on the constant practice of moving in arrest of judgment after verdict found: "What? After verdict, shall the Court be guessing and inventing a mode in which it might be barely possible for these words to have been spoken by the defendant, without meaning to charge the plaintiff with being guilty of murder? Certainly not. Where it is clear that words are defectively laid, a verdict will not cure them. But [*97] where, from their general import, they appear to have been spoken with a view to defame a party, the Court ought not to be industrious in putting a construction upon them different from what they bear in the common acceptation and meaning of them." And his Lordship quoted a *dictum* of Parker, C. J., in *Ward* v. *Reynolds*, Pasch, 12 Anne, B. R. to the same effect. So in *Harrison* v. *Thornborough*, 10 Mod. 197, the Court says: "The rule that has now prevailed is that words are to be taken in that sense that is most natural and obvious, and in which those to whom they are spoken will be sure to understand them." (See also the remarks of De Grey, C. J., in *R.* v. *Horne*, 2 Cowp. 682–689 ; of Buller, J.,

in *R.* v. *Watson and others*, 2 T. R. 206 ; and the judgments in *Woolnoth* v. *Meadows*, 5 East, 463 ; 2 Smith, 28.)

And such is now the law. The Courts no longer strain to find an innocent meaning for words *primâ facie* defamatory, neither will they put a forced construction on words which may fairly be deemed harmless. "Formerly," says Lord Ellenborough in 2 Camp. 403, "it was the practice to say that words were to be taken in the more lenient sense ; but that doctrine is now exploded : they are not to be taken in the more lenient or more severe sense, but in the sense which fairly belongs to them."

And, again, in *Roberts* v. *Camden*, 9 East, 95, the same learned judge says : "The rule which once prevailed, that words are to be understood *in mitiori sensu*, has been long ago superseded ; and words are now to be construed by Courts, as they always ought to have been, in the plain and popular sense in which the rest of the world naturally understand them." Now, therefore, the only question for the judge or the Court is whether the words are *capable* of the defamatory meaning attributed to them ; if they are, then it is for the jury to decide what is in fact the true construction.

So long as the defendant's words are not absolutely unintelligible, a jury will judge of the meaning as well as other readers or hearers. All perplexity and obscurity will disappear under the narrow examination which the words will receive in a Court of law. It matters not whether the defamatory words be in English or in any other language that is understood in England, whether they be spelt correctly or incorrectly, whether the phrase be grammatical or not, whether cant or slang terms be employed, or the most refined and elegant diction. (*R.* v. *Edgar*, 2 Sess. Cas. 29 ; 5 Bac. Abr. 199.) The insinuation may be indirect, and the allusion obscure ; it may be put as a question or as an "on dit :" the language may be ironical, figurative, or allegorical ; still, if there be a meaning in the words at [*98] all, the Court will find it out, even though it be disguised in a riddle or in hieroglyphics. In all cases of ambiguity it is purely a question for the jury to decide what meaning the words would convey to persons of ordinary intelligence. (*Grant* v. *Yates* (C. A.), 2 Times L. R. 368.)

And before answering that question the jury should well weigh all the circumstances of the case, the occasion of speaking, the relationship between the parties, &c. Especially they should consider the words as a whole, not dwelling on isolated passages, but giving its proper weight to every part. (Per Tindal, C. J., in *Shipley* v. *Todhunter*, 8 C. & P. 680.) The sting of a libel may sometimes be contained in a word or sentence placed as a heading to it. The defendant will often be held liable merely in consequence of such prefix, where, without it, he would have had a perfect answer to the action. So, too, a word added at the end may altogether vary the sense of the preceding passage. The defendant is, therefore, entitled to have the whole of the alleged libel read as part of plaintiff's case. (*Cooke* v. *Hughes*, R. & M. 112.) And for the purpose of showing that what he wrote is no libel, and will not bear the construction which plaintiff seeks to put upon it, the

defendant may give in evidence any other passages in the same publication which plainly refer to the same matter, or which qualify or explain the passage sued on. (*R.* v. *Lambert and Perry*, 2 Camp. 400; 31 Howell St. Tr. 340; *Darby* v. *Ouseley*, 25 L. J. Ex. 229; 1 H. & N. 1; 2 Jur. N. S. 497; *Bolton* v. *O'Brien*, 16 L. R. Ir. 97.)

So, too, with a slander; very often the words immediately preceding or following may much modify those relied on by the plaintiff. (*Bittridge's Case*, 4 Rep. 19; *Thompson* v. *Bernard*, 1 Camp, 48.) When the language sued on is ambiguous, and some extrinsic evidence is necessary to construe it, evidence may even be given of other libels or slanders published by the defendant of the plaintiff, which explain or qualify that sued on. But such evidence is not admissible where the meaning of the words is clear and undisputed. (*Stuart* v. *Lovell*, 2 Stark. 93; *Pearce* v. *Ornsby*, 1 M. & Rob. 455; *Symmons* v. *Blake*, *ib.* 477; 2 C. M. & R. 416; 4 Dowl. 263; 1 Gale, 182; *Traill* v. *Denham*, *Times* for May 4th, 1880.) And when such evidence is admitted, the jury should always be cautioned not to give any damages in respect of it. (Per Tindal, C. J., in *Pearson* v. *Lemaitre*, 5 M. & Gr. 720; 12 L. J. Q. B. 253; 7 Jur. 748; 6 Scott, N. R. 607.)

Illustrations.

The *Observer* gave a correct account of some proceedings in the Insolvent Debtors' Court, but it was headed "Shameful Conduct of an Attorney." The [*99] rest of the report was held privileged; but the plaintiff recovered damages for the heading.

Clement v. *Lewis*, 3 Br. & B. 297: 7 Moore, 200; 3 B. & Ald. 702. And see *Mountney* v. *Watton*, 2 B. & Ad. 673.
Bishop v. *Latimer*, 4 L. T. 775.
Boydell v. *Jones*, 4 M. & W. 446; 7 Dowl. 210; 1 H. & H. 408.
Harvey v. *French*, 1 Cr. & M. 11; 2 M. & Scott, 591; 2 Tyr. 585.
Lewis v. *Levy*, E. B. & E. 537; 27 L. J. Q. B. 282; 4 Jur. N. S. 970.
Street v. *Licensed Victualler's Society*, 22 W. R. 553.
Stanley v. *Webb*, 4 Sandf. (N. Y.) 21.

An action was brought for an alleged libel, published in the *True Sun* newspaper:—"Riot at Preston.—From the *Liverpool Courier*.—It appears that Hunt pointed out Counsellor Seager to the mob, and said, 'There is one of the black sheep.' The mob fell upon him and murdered him. In the affray Hunt had his nose cut off. The coroner's inquest have brought in a verdict of wilful murder against Hunt, who is committed to gaol.—Fudge." The plaintiff contended that the word "Fudge" was merely introduced with reference to the future, in order that the defendants might afterwards, if the paragraph were complained of, be able to refer to it, as showing that they intended to discredit the statement. Lord Lyndhurst, C. B., told the jury that the question was, with what motive the publication was made. It was not disputed that if the paragraph, which was copied from another paper, stood without the word "Fudge," it would be a libel. If they were of opinion that the object of the paragraph was to vindicate the plaintiff's character from an unfounded charge, the action could not be maintained; but if the word "Fudge" was only added for the purpose of making an argument at a future day, then it would not take away the effect of the libel. Verdict for the plaintiff. Damages, one farthing.

Hunt v. *Algar and others*, 6 C. & P. 245.

Of the Innuendo.

In arriving at the meaning of the defendant's words, the Court

and jury are often materially assisted by an averment in the plaintiff's statement of claim, called an *innuendo*. This is a statement by the plaintiff of the construction which he puts upon the words himself, and which he will endeavour to induce the jury to adopt at the trial. Where a defamatory meaning is apparent on the face of the libel itself, no innuendo is necessary; though even there the pleader occasionally inserts one to heighten the effect of the words. But where the words *prima facie* are not actionable, an innuendo is essential to the action. It is necessary to bring out the latent injurious meaning of the defendant's [* 100] words; and such innuendo must distinctly aver that the words bear a specific actionable meaning. (*Cox* v. *Cooper*, 12 W. R. 75; 9 L. T. 329.)

It is the office of an innuendo to define the defamatory meaning which the plaintiff sets on the words; to show how they come to have that defamatory meaning; and also to show how they relate to the plaintiff, whenever that is not clear on the face of them. But an innuendo may not introduce new matter, or enlarge the natural meaning of words. It must not put upon the defendant's words a construction which they will not bear. It cannot alter or extend the sense of the words, or make that certain which is in fact uncertain. (*James* v. *Rutlech*, 4 Rep. 17.) If the words are *incapable* of the meaning ascribed to them by the innuendo, and are *prima facie* not actionable, the judge at the trial will stop the case. If, however, the words are *capable* of the meaning ascribed to them, however improbable it may appear that such was the meaning conveyed, it must be left to the jury to say whether or no they were in fact so understood. (*Hunt* v. *Goodlake*, 43 L. J. C. P. 54; 29 L. T. 472; *Broome* v. *Gosden*, 1 C. B. 728.) This is so in America. (*Patch* v. *Tribune Association*, 38 Hun. (45 N. Y. Supr. Ct.) 368.)

An innuendo now requires no prefatory averment to support it. (Common Law Procedure Act, 1852, s. 61.) The libel or slander sued on must of course be set out *verbatim* in the statement of claim; the innuendo usually follows it immediately. Such a pleading is to be considered as two counts under the old system, one with an innuendo and one without. And if the plaintiff can show a good cause of action, either with or without the alleged meaning, he is entitled to recover. (Per Blackburn, J., in *Watkin* v. *Hall*, L. R. 3 Q. B. 402; 37 L. J. Q. B. 125; 16 W. R. 857; 18 L. T. 561.)

The defendant is in no way embarrassed by the presence of the innuendo in the statement of claim: in fact it is to him an advantage. He can either deny that he ever spoke the words, or he can admit that he spoke them, but deny that they conveyed that meaning. He can also assert that the words he spoke were true, either with or without the alleged meaning. It will then be for the jury to say whether [*101] the plaintiff's innuendo is borne out. If not, the plaintiff may fall back upon the words themselves, and urge that, taken in their natural and obvious signification, they are actionable *per se* without the alleged meaning, and that therefore his unproved innuendo may be rejected as surplusage. (*Harvey* v. *French*, 1 Cr. & M. 11;

2 M. & Scott, 591 ; 2 Tyrw. 585.) But he cannot in the middle of the case start a fresh innuendo not on the record ; he must abide by the construction he put on the words in his statement of claim, or else rely on their natural and obvious import. (*Simmons* v. *Mitchell*, 6 App. Cas. 126 ; 50 L. J. P. C. 11 ; 29 W. R. 401 ; 43 L. T. 710 ; 45 J. P. 237.) He may not during the trial set up a third construction of the words different both from their *primâ facie* meaning and from that pointed by the innuendo ; if he win a verdict in this way, the Court will grant a new trial on the ground of surprise. (*Hunter* v. *Sharpe*, 4 F. & F. 983 ; 15 L. T. 421 ; *Ruel* v. *Tatnell*, 29 W. R. 172 ; 43 L. T. 507.) If the jury negative his innuendo, and the words are not actionable in their natural and primary sense, judgment must pass for the defendant. (*Brembridge* v. *Latimer*, 12 W. R. 878 ; 10 L. T. 816 ; *Maguire* v. *Knox*, Ir. R. 5 C. L. 408.)

Illustrations.

"He hath forsworn himself." These words are not in themselves a sufficient imputation of perjury, because he is not said to have sworn falsely while giving evidence in Court. Hence an innuendo "before the justice of assize" is clearly bad ; for it is not an *explanation* of defendant's words, but an *addition* to them.

Anon., 1 Roll. Abr. 82.

Holt v. *Sholefield*, 6 T. R. 691.

A libel alleged that a gentleman was on a certain night hocussed and robbed of £40, in the plaintiff's public-house. An innuendo "meaning thereby that the said public-house was the resort of, and frequented by, felons, thieves, and depraved and bad characters," after verdict for the defendant, was held too wide.

Broome v. *Gosden*, 1 C. B. 728.

Clarke's Case de Dorchester (1619), 2 Rolle's Rep. 136.

The words "I was speaking to a lady about Mrs. Y.'s case" cannot support an innuendo, meaning thereby that the plaintiff (Mrs. Y.) had been guilty of adultery.

York v. *Johnson*, 116 Mass. 482.

Libel complained of :—"He has become so inflated with self-importance by the few hundreds made in my service—God only knows whether honestly or otherwise—that," &c. Innuendo, "meaning thereby to insinuate that the plaintiff had conducted himself in a dishonest manner in the service of the defendant." The Court refused to disturb a verdict for the plaintiff.

Clegg v. *Laffer*, 3 Moore & Sc. 727 ; 10 Bing. 250.

The defendant said, "Master Barham did burn my barn with his own hands, and none but he." At that date it was not felony to burn a barn, unless it [*102] were either full of corn or parcel of a mansion-house. An innuendo, "a barn full of corn," was held too wide. "That is not," says De Grey, C. J., commenting on this case in Cowp. 684, "an *explanation* of what was said before, but an *addition* to it. But if in the introduction it had been averred, that the defendant had a barn full of corn, and that in a discourse about the barn, the defendant had spoken the words charged in the libel of the plaintiff ; an innuendo of its being the barn full of corn would have been good. For by coupling the innuendo in the libel with the introductory averment, 'his barn full of corn,' it would have made it compleat."

Barham's Case, 4 Rep. 20 ; Yelv. 21

See *Capital and Counties Bank* v. *Henty & Sons* (C. A.), 5 C. P. D. 514 ; 49 L. J. C. P. 830 ; 28 W. R. 851 ; 43 L. T. 651 ; H. L. 7 App. Cas. 741 ; 52 L. J. Q. B. 232 ; 31 W. R. 157 ; 47 L. T. 662 ; 47 J. P. 214.

An information was filed against a Nonconformist minister for a libel upon "the bishops" contained in a book, called "A Paraphrase upon the New

Testament." An innuendo, "the bishops *of England*," was held to be allowable, if from the nature of the libel this was clearly what was meant.

R. v. *Baxter* (1685), 3 Mod. 69.

The libel accused a gentleman of saying, "He could see no probability of the war's ending with France, until the little gentleman on the other side of the water was restored to his rights." Innuendo, "The Prince of Wales," allowed to be good; in fact the Court thought the meaning was clear without any innuendo.

Anon. (1707), 11 Mod. 99.

R. v. *Matthews* (1719), 15 How. St. Tr. 1323.

Libel :— "The mismanagements of the navy have been a greater tax upon the merchants than the duties raised by government." An innuendo, "the royal navy of this kingdom," held not too wide.

R. v. *Tutchin* (1704), 14 How. St. Tr. 1095; 5 St. Tr. 527; 2 Ld. Raym. 1061; Salk. 50; 6 Mod. 268.

R. v. *Horne* (1777), Cowp. 672; 11 St. Tr. 264; 20 How. St. Tr, 651.

The words "We have no doubt sufficient information will be obtained for a strong case to lay before the Home Secretary to enable that functionary to cause it to be intimated to the suspected party that his presence here can be dispensed with, as far as it may be attended with danger to himself," were held in the Exchequer Chamber not to support an innuendo, meaning thereby that the prosecutor was suspected of having had committed some crime which would bring his life into danger from the laws of England.

Gregory v. *The Queen* (No. 2), 5 Cox, C. C. 252.

The words complained of in their natural sense conveyed only suspicion, and were therefore not actionable; there were innuendoes, but none of them stated that the words imputed felony, though there was a prefatory averment stating that defendant's motive was to cause it to be believed that plaintiff had been guilty of felony. *Held*, that this prefatory averment could not be substituted for the innuendoes whereby plaintiff undertook to give the meaning of the words spoken.

Simmons v. *Mitchell*, 6 App. Cas. 156; 50 L. J. P. C. 11; 29 W. R. 401; 43 L. T. 710; 45 J. P. 237.

The alleged libel was as follows :—"Notice,—any person giving information [* 103] were any property may be found belonging to H. G. (*meaning the plaintiff*), a prisoner in the King's Bench prison, but residing within the rules thereof, shall receive five per cent. upon the goods recovered, for their trouble, by applying at Mr. L.," &c. Innuendo, that the plaintiff had been and was guilty of concealing his property with a fraudulent and unlawful intention. *Held*, on general demurrer, that the innuendo, unsupported by any prefatory averment, was too large; and that the words, in themselves, were not actionable.

Gompertz v. *Levy*, 9 A. & E. 282; 2 Jur. 1013; 1 P. &. D. 214; 1 W. W. & H. 728.

Wheeler v. *Haynes*, 9 A. & E. 286, note; 1 W. W. C H. 645; 1 P. & D. 55.

Capel and others v. *Jones*, 4 C. B. 259; 11 Jur. 396.

Day v. *Robinson*, 1 A. & E. 554; 4 N. & M. 884.

Adams v. *Meredew*, 2 Y. & J. 417; 3 Y. & J. 219.

But all these cases are overruled by the C. L. P. Act, 1852, s. 61. as interpreted in

Hemmings v. *Gasson*, E. B. & E. 346; 27 L. J. Q. B. 522; 4 Jur. N. S. 834.

Words complained of :—"He is a regular prover under bankruptcies." An innuendo, "the defendant meaning thereby that the plaintiff had proved and was in the habit of proving fictitious debts against the estates of bankrupts, with the knowledge that such debts were fictitious," is now all that is necessary.

C. L. P. Act, 1852, Sched, B., form 33.

Not so formerly.

Angle v. *Alexander*, 7 Bing. 119; 1 Cr. & J. 143; 1 Tyrw. 9; 4 M. & P. 870, *ante*, p. 80.

Words may be :—

(1) obviously defamatory ;
(2) ambiguous : that is, words which, though *primâ facie* defamatory, are still on the face of them susceptible of an innocent meaning ;
(3) neutral ; *i. e.*, words which are meaningless till some explanation is given ; such are slang expressions, words in a foreign language, words used in some special, local, technical, or customary sense ;
(4) *primâ facie* innocent, but capable of a defamatory meaning ;
(5) Obviously innocent ; words which *cannot* be construed so as to convey any imputation on the plaintiff.

To these different classes of words special rules of pleading, evidence, and construction apply.

[*104] 1. *Words obviously defamatory.*

Here no innuendo is necessary. No parol evidence is admissible at the trial to explain the meaning of the words. The defendant cannot be heard to say that he did not intend to injure the plaintiff's reputation, if he has in fact done so. The question is still of course for the jury ; but the judge will practically direct them that the words are actionable and that they should find for the plaintiff on that issue. Should the jury perversely refuse to follow the judge's direction, a new trial will be granted. (*Levi* v. *Milne*, 4 Bing. 195 ; 12 Moore, 418.)

But the defendant may plead circumstances which made it clear at the time he spoke or wrote that the words were not used in their ordinary signification. He may thus take the words out of this class into class 2, words *primâ facie* defamatory. It will then be a question for the jury how the bystanders understood the words. But such question only arises where the words are susceptible of the innocent meaning which the defendant seeks to place on them, and where also the circumstances which are alleged to qualify the injurious words were known to the bystanders at the time.

Illustrations.

It is libellous without any innuendo, to write and publish that a newspaper has a separate page devoted to the advertisements of usurers and quack doctors, and that the editor takes respectable advertisements at a cheaper rate if the advertisers will consent to their appearing in that page. The Court, however, expressed surprise at the absence of some such innuendo as "meaning thereby that the plaintiff's paper was an ill-conducted and low-class journal."

Russell and another v. *Webster*, 23 W. R. 59.

Where a libel called the plaintiff a "truckmaster," and the defendant justified ; but no evidence was given at the trial as to the meaning of the word ; the Court held after some hesitation that, though the word was not to be found in any English dictionary, its meaning was sufficiently clear to sustain the action, there being a statute called "The Truck Act."

Homer v. *Taunton*, 5 H. & N. 661; 29 L. J. Ex. 318 ; 8 W. R. 499; 2 L. T. 512.

To write and publish that a certain woman is a prostitute, and that "she is, I understand, under a patronage or protection of" the plaintiff, was held [* 105] actionable in the Court of Appeals in New York, although there was no innuendo averring that she was under the plaintiff's protection for immoral purposes.

Moore v. *Bennett* (1872), 48 N. Y. R. (3 Sickels), 472;
reversing the judgment of the Supreme Court below, reported 33 How. P. R. 180; 48 Barbour, N. Y. 229.

It is libellous to write and publish these words:—"Threatening letters. The Middlesex grand jury have returned a true bill against a gentlemen of some property named French." And no innuendo is necessary to explain the meaning of the words; for they can only import that the grand jury had found a true bill against French for the misdemeanour of sending threatening letters.

Harvey v. *French*, 1 Cr. & M. 11; 2 M. & Scott, 591; 2 Tyrw. 585;

Allegorical terms of well-known import are libellous *per se*, without innuendoes to explain their meaning; *e.g.*, imputing to a person the qualities of the "frozen snake," or calling him "Judas."

Hoare v. *Silverlock* (No. 1, 1848), 12 Q. B. 624; 17 L. J. Q. B. 306; 12 Jur. 695.

Words complained of:—"Thou art a thief;" no innuendo at all is necessary, as larceny is clearly imputed.

Blumley v. *Rose*, 1 Roll. Abr. 73.
Slowman v. *Dutton*, 10 Bing. 402.

If the words can be understood as imputing a crime, no innuendo is necessary. And, if it were, an innuendo, "meaning thereby that the plaintiff had been guilty of a criminal offence," is sufficient without specifying what particular crime is meant.

Webb v. *Beavan*, 11 Q. B. D. 609; 52 L. J. Q. B. 544; 49 L. T. 201; 47 J. P. 488.
Kinnahan v. *McCullagh*, Ir. R. 11 C. L. 1.
Saunders v. *Edwards*, 1 Sid. 95.
Francis v. *Roose*, 3 M. & W. 191; 1 H. & H. 36.

To say, "He robbed John White," is *primâ facie* clearly actionable. But the defendant may show, if he can, that that is not the sense in which the words were fairly understood by bystanders who listened to the whole conversation, though previously unacquainted with the matter to which the words sued on relate.

Tomlinson v. *Brittlebank*, 4 B. & Adol. 630; 1 Nev. & Man. 455.
Hankinson v *Bilby*, 16 M. & W. 442; 2 C. & K. 440.
Martin v. *Loci*, 2 F. & F. 654.

"Blackmailing" is clear, and requires no innuendo to support it.

Edsall v. *Brooks*, 2 Robt. 29; 3 Robt. 284 (New York).

So is "pettifogging shyster" when applied to a lawyer. "Courts have no right to be ignorant of the meaning of current phrases which everybody else understands."

Bailey v. *Kalamazoo Publishing Co.* (1879), 4 Chaney (40 Michigan) 251.

[* 106]

2. *Words* primâ facie *defamatory.*

Here, too, no innuendo is necessary, and no parol evidence is admissable at the trial to explain the meaning of the words. The judge will direct the jury that the words are *primâ facie* actionable.

But the defendant may plead circumstances which made it clear at the time that the words were not used by him in their ordinary

signification. He may plead that the words were uttered merely in a joke, and were so understood by all who heard them; or that the words were part of a longer conversation, the rest of which limits and explains the words sued on; or any other facts which tend to show that they were uttered with an innocent meaning, and were so understood by the bystanders. And if such a defence be pleaded, parol evidence may be given of the facts alleged. And then it becomes a question for the jury whether the facts as pleaded are substantially proved, and whether they do put on the words a colour different from what they would *primâ facie* bear. It is generally difficult, however, to induce the jury to adopt the defendant's harmless view of his own language. But see *Grant* v. *Yates*, 2 Times L. R. 368.

But the defendant may not plead or give in evidence any facts which were not known to the bystanders at the time the words were uttered. The defendant's secret intent in uttering the words is immaterial. (*Hankinson* v. *Bilby*, 16 M. & W. 445; 2 C. & K. 440.)

The defendant is allowed thus to give evidence of all "the surrounding circumstances," in order to place the jury so far as possible in the position of bystanders, so that they may judge how the words would be understood on the particular occasion. But though evidence of such extrinsic facts is admitted, parol evidence merely to explain away the words used, to show that they did not for once bear their ordinary signification, is inadmissable. A witness cannot be called to say, "*I* should not have understood defendant to make any [* 107] imputation whatever on the plaintiff." The jury know what ordinary English means, and need no witness to inform them.

The leading case on this point is one cited in the *Lord Cromwell's Case* (1578), 4 Rep. 13, 14. (At least, it appears to be a decided case, not a mere illustration.) "If a man brings an action on the case for calling the plaintiff murderer, the defendant will say, that he was talking with the plaintiff concerning unlawful hunting, and the plaintiff confessed that he killed several hares with certain engines; to which the defendant answered and said, 'Thou art a murderer' (innuendo the killing of the said hares). . . . Resolved by the whole Court, that the justification was good. For in case of slander by words, the sense of the words ought to be taken, and the sense of them appears by the cause and occasion of speaking of them for *sensus verborum ex causâ dicendi accipiendus est et sermones semper accipiendi sunt, secundum subjectam.* . . . And it was said, God forbid that a man's words should be by such strict and grammatical construction taken by parcels against the manifest intent of the party upon consideration of all the words, which import the true cause and occasion which manifest the true sense of them; *quia quæ ad unum finem loquuta sunt, non debent ad alium detorqueri:* and, therefore, in the said case of murder, the Court held the justification good; and that the defendant should never be put to the general issue, when he confesses the words, and justifies them, or

confesses the words, and by special matter shows that they are not actionable." (And see *Shipley* v. *Todhunter* 7 C. & P. 680.)

Illustrations.

Words complained of:—" Thou hast killed my wife." Defendant's wife was still alive, and the bystanders knew it. *Held*, that plaintiff was not put " in any jeopardy, and so the words vain, and no scandal or damage to the plaintiff."

Snag v. *Gee*, 4 Rep. 16, as explained by Parke, B., in *Heming* v. *Power*, 10 M. & W. 569.

Words complained of :—" You stole my apples." The defendant cannot be allowed to state that he only meant to say, you have tortiously removed my apples under an unfounded claim of right." The bystanders could not possibly have understood from the word used that a civil trespass only was imputed.

Devrill v. *Hulbert* (Jan. 25th, 1878), *unreported.*

But where the words complained of are, " Thou art a thief ; for thou tookest my beasts by reason of an execution, and I will hang thee," no action lies [*108] for it is clear that the whole sentence taken together imports only a charge of trespass.

Wilk's Case, 1 Roll. Abr. 51.
Smith v. *Ward*, Cro. Jac. 674.
Sibley v. *Tomlins*, 4 Tyrw. 90.

Where words are used which clearly import a criminal charge (as " You thief," or " You traitor "), it is still open to the defendant to show if he can that he used them merely as vague terms of general abuse, and that the bystanders must have understood him as meaning nothing more than " You rascal," or " You scoundrel." When such words occur in a string of non-actionable epithets, or in a torrent of general vulgar abuse, the jury may reasonably infer that no felony was seriously imputed. If, however, the jury put the harsher constructions on defendant's language, no new trial will be granted ; for it is a question entirely for them.

Minors v. *Lecford*, Cro. Jac. 114.
Penfold v. *Westcote*, 2 Bos. & P. N. R. 335.

Where the defendant said to the plaintiff in the presence of others, " You are a thief, a rogue, and a swindler," it was held that the defendant could not call a witness to explain the particular transaction which he had in his mind at the time, since he did not in any way expressly refer to it in the prssence of his hearers.

Martin v. *Loci*, 2 F. & F. 654.
Read v. *Ambridge*, 6 C. & P. 308.
Hankinson v. *Bilby*, 16 M. & W. 442; 2 C. & K. 440.

Defendant stated publicly that plaintiff had been detected taking dead bodies out of the churchyard and fined, &c. He meant it as a joke ; but there was no evidence that the bystanders so understood it. The Court set aside a verdict for the defendant. Per Joy, C. B., " the principle is clear that a person shall not be allowed to murder another's reputation in jest. But if the words be so spoken that it is obvious to every bystander that only a jest is meant, no injury is done, and consequently no action would lie."

Donoghes v. *Hayes* (1831), Hayes (Irish Exch.), 265.

But where the defendant said, " Thompson is a damned thief ; and so was his father before him, and I can prove it ; " but added, " Thompson received the earnings of the ship, and ought to pay the wages," Lord Ellenborough held that the latter words qualified the former and showed no felony was imputed ; the person to whom the words were spoken being the master of the ship and acquainted with all the circumstances referred to.

Thompson v. *Bernard*, 1. Camp. 48.
Bittridge's Case, 4. Rep. 19.
Cristie v. *Corell*, Peake, 4.
Day v. *Robinson*, 1 A. & E. 554 ; 4 N. & M. 884.

[*109] 3. *Neutral Words.*

Where the defendant has used only ordinary English words, the

judge can decide at once whether they are *primâ facie* actionable or not. But where the words are in a foreign language, or are technical or provincial terms, an innuendo is absolutely necessary to disclose an actionable meaning. So, too, an innuendo is essential where ordinary English words are not in the particular instance used in their ordinary English signification, but in some peculiar sense.

Where the words are spoken in a foreign language the original words should be set out in the statement of claim, and then an exact translation should be added. (*Zenobio* v. *Axtell*, 6 T. R. 162 ; 3 M. & S. 116.) In the case of slander an averment was formerly required to the effect that those who were present understood that language. (*Fleetwood* v. *Curl*, Cro. Jac. 557 ; Hob. 268.) And though such an averment is no longer necessary, the fact must still be proved at the trial. For if words be spoken in a tongue altogether unknown to the hearers, no action lies (*Jones* v. *Davers* (*vel Dawkes*) (1597), Cro. Eliz. 496 ; 1 Roll. Abr. 74) ; for no injury is done to the plaintiff's reputation. But if a single bystander understood them, that is enough. Where, however, the words are spoken in the vernacular of the place of publication (as Welsh words spoken in Wales) it will be presumed that the bystanders understood them. At the trial the correctness of the translation must be proved by a sworn interpreter.

So at the trial whenever the words used are not ordinary English, but local, technical, provincial, or obsolete expressions, or slang or cant terms, evidence is admissible to explain their meaning, provided such meaning has been properly alleged in the statement of claim. But when the words are well-known and perfectly intelligible English the Court will give them their ordinary English meaning, [*110] unless it is in some way shown that that meaning is inapplicable. This may appear from the words themselves ; for in some cases to give them their ordinary English meaning would make nonsense of them. But if in their ordinary English meaning the words would be intelligible, facts must be given in evidence to show that they may have been used in another special meaning on this particular occasion. After that has been done a bystander may be asked, "What did you understand by the expression used ?" But without such a foundation being first laid the question is not allowable. (*Daines* v. *Hartley*, 3 Exch. 200 ; 18 L. J. Ex. 81 ; 12 Jur. 1093.)

Illustrations.

Words complained of :—"You are a bunter." No innuendo ; Willes, J., nonsuited the plaintiff, on the ground that the word had no meaning at all, and could not therefore be defamatory in ordinary acceptation ; and he refused to allow the plaintiff to be asked, what the word "bunter" meant. *Aliter*, had there been an innuendo averring a defamatory sense to the word "bunter."
Rawlings et ux. v. *Norbury*, 1 F. & F. 341.

Words spoken to an attorney :—"Thou art a daffadowndilly." Innuendo, meaning thereby that he is an "ambidexter," *i.e.*, one who takes a fee from both sides, and betrays the secrets of his client. *Held*, that an action lay.
Anon., (Exch.) 1 Roll. Abr. 55.
Annison v. *Blofield*, Carter, 214.

It is actionable to say, "Thou art a clipper, and thy neck shall pay for it." "For though 'clipper' is general, and may be intended a clipper of wool, cloth, &c., yet the following words show it to be intended of clipping for which he shall be hanged."

Naben v. *Miecock*, Skin. 183.

It is actionable to say of a stockjobber that, "He is a lame duck," innuendo, "meaning thereby that the plaintiff had not fulfilled his contracts in respect of the said stocks and funds," (stockjobbing being now legalized by the 23 & 24 Vict. c. 28).

Morris and Langdale, 2 Bos. & Pul. 284.

It is libel on L. to write and publish of him that he is one of "a gang who live by cardsharping," there being an innuendo, "meaning thereby that L. is a swindler and a cheat, and lives by cheating or playing at cards, and that he and B. and G. had, previous to the libel, conspired together in cheating divers persons in playing at cards."

Reg. pros. Lambri v. *Labouchere*, 14 Cox, C.C. 419.

The word "welcher" requires an innuendo to explain its meaning.

Blackman v. *Bryant*, 27 L. T. 491.

Pollock, C B., thought the word "truckmaster" required no innuendo to [*111] explain its meaning, as it "is composed of two English words intelligible to everybody."

Homer v. *Taunton*, 5 H. & N. 661 ; 29 L. J. Ex. 318 ; 8 W. R. 499; 2 L. T. 512.

But so are "blackleg" and "blacksheep," and these words do require an innuendo.

M'Gregor v. *Gregory*, 11 M. & W. 287 ; 12 L. J. Ex. 204 ; 2 Dowl. N. S. 769.

O'*Brien* v. *Clement*, 16 M. & W. 166 ; 16 L. J. Ex. 77.

Barnett v. *Allen*, 1 F. & F. 125 ; 27 L. J. Ex. 412 ; 4 Jur. N. S. 488 ; 3 H. & N. 376.

The defendant charged the plaintiff, a pawnbroker and silversmith, with "duffing" : an innuendo, "meaning thereby the dishonourable practice of furbishing up damaged goods and pledging them with other pawnbrokers as new," was held good.

Hickinbotham v. *Leach*, 10 N. & W. 361 ; 2 Dowl. N. S. 270.

The words, "He is mainsworn," were spoken in one of the northern counties where "mainsworn" is equivalent to "perjured" (forsworn with his *hand* on the book.) *Held* actionable.

Slater v. *Franks*, Hob. 126.

And see *Coles* v. *Hariland*, Cro. Eliz. 250 ; Hob. 12.

A. and B. were partners, and were conversing with the defendant. A. said they held some bills on the plaintiff's firm ; the defendant said :— "You must look out sharp that they are met by them." At the trial, B. was called as a witness, and stated these facts. The counsel for the plaintiff then proposed to ask B. :—"What did you understand by that ?" But the question was objected to, and disallowed by the judge (Pollock, C. B.) in that form, and the counsel would put it in no other shape. The jury found a verdict for the defendant : and the Court of Exchequer refused to grant a new trial.

Daines and another v. *Hartley*, 3 Exch. 200 ; 18 L. J. Ex. 81 ; 12 Jur. 1093.

Libel complained of : "There are very few persons in society who do not look upon the whole affair to be got up for a specific occasion, and consider that it has been neither more or less than a 'plant.' We have heard it roundly asserted that a clerk of Mr. Hamer, the notorious lawyer, was placed under a sofa at his lordship's residence when the Earl of Cardigan called there." The indictment stated, "that the said Tomas Holt used the words 'a plant' for the purpose of expressing and meaning, and the said words used by him were by divers, to wit, all the persons to whom the said libel was published, understood as expressing and meaning, an artful and wicked plan and contrivance made and entered into by the said William Paget, Esq., and other persons by false and unfounded testimony and a wrongful and wicked perversion of facts to make out, support and establish the said charge, and by concert and arrangement falsely to fix

upon the said earl the commission of the said trespass and assault for the purpose of obtaining divers of the moneys of the said earl to the use of the said William Paget, Esq.," and concluded with the following innuendo :—"Thereby then and there meaning that the said William Paget, Esq., had with other persons artfully and wickedly planned and contrived to make a false and unfounded charge against the said earl of his having been guilty of the said trespass and assault upon the said wife of the said William Paget, Esq., and to make [*112] out, support and establish such charge by false and unfounded testimony and a wicked and wrongful perversion of facts for the purpose of extorting and obtaining from the said earl divers of his moneys to the use of the said William Paget, Esq." A reporter for one of the London newspapers was called to define "a plant," and his evidence justified the innuendo. The recorder left it to the jury whether they were satisfied that the word "plant" bore the meaning attributed to it by the prosecution; if so, the passage was libellous. Verdict, guilty.

R. v. *Thomas Holt*, 8 J. P. 212.

The defendant, the editor of a newspaper, owed plaintiff money under an award; and wrote and published in his newspaper these words :—"The money will be forthcoming on the last day allowed by the award, but we are not disposed to allow him to put it into Wall-street, for shaving purposes before that period." "Shaving" in New York means, (i) discounting bills or notes; (ii) fleecing men of their goods or money by overreaching, extortion, and oppression. The declaration contained no innuendo alleging that the words were used in the second defamatory sense. *Held* no libel, on demurrer.

Stone v. *Cooper* (1845), 2 Denio (N. Y.), 293.

4. *Words* primâ facie *innocent, but capable of a Defamatory Meaning.*

Wherever the defendant's words are capable both of a harmless and an injurious meaning, it will be a question for the jury to decide which meaning the hearers or readers would on the occasion in question have reasonably given to the words. Here an innuendo is essential to show the latent injurious meaning. Without an innuendo, there would be no cause of action shown on the record. And such innuendo should be carefully drafted; for on it the plaintiff must take his stand at the trial. He cannot during the course of the case adopt a fresh construction. He may, it is true, fall back on the natural and obvious meaning of the words: but that we assume here not to be actionable. And such innuendo must be specific; it must distinctly aver a definite actionable meaning. A general averment, such as, "using the words in a defamatory sense," or "for the purpose of creating an impression unfavourable to the plaintiff," would be insufficient. (*Cox* v. *Cooper*, 12 W. R. 75; 9 L. T. 329.)

The words, too, must be fairly susceptible of the defamatory meaning put upon them by the innuendo, or the [*113] judge at the trial will stop the case. "The judge must decide if the words are reasonably capable of two meanings; if he so decide, the jury must determine which of the two meanings was intended." (Per Sir Montague Smith, 6 App. Cas. at p. 158; *Jenner and another* v. *A'Beckett*, L. R. 7 Q. B. 11; 41 L. J. Q. B. 14; 20 W. R. 181; 25 L. T. 464; *Grant* v. *Yates*, 2 Times L. R. 368.) And their decision on the point is final and conclusive.

In determining this question the jury will consider the whole of the circumstances of the case, the occasion of publication, the relationship between the parties, &c. A further question of fact

may arise: Were there any facts known both to speaker and hearer which would reasonably lead the latter to understand the words in a secondary and a defamatory sense? And this is a question for the jury, if there be any evidence to go to them of such facts. (*Capital and Counties Bank* v. *Henty & Sons* (C. A.), 5 C. P. D. 514; 49 L. J. C. P. 830; 28 W. R. 851; (H. L.) 7 App. Cas. 741; 52 L. J. Q. B. 232; 31 W. R. 157; 47 L. T. 662; 47 J. P. 214; *Ruel* v. *Tatnell*, 29 W. R. 172; 43 L. T. 507.) Also whenever the words of a libel are ambiguous, or the intention of the writer equivocal, subsequent libels are admissible in evidence to explain the meaning of the first, or to prove the innuendoes, even although such subsequent libels be written after action brought.

Hence "if the defendant can get *either* the Court or the jury to be in his favour, he succeeds. The prosecutor or plaintiff cannot succeed unless he gets *both* the Court and the jury to decide for him." (Per Lord Blackburn, 7 App. Cas. at p. 776.)

Illustrations.

"He is a healer of felons;" innuendo, a concealer of felons. *Held* actionable.

Pridham v. *Tucker*, Yelv. 153; Hob. 126; Cart. 214.

"He has set his own premises on fire." These words are *primâ facie* innocent; but may become actionable, if it be averred that the house was insured, and that the words were intended to convey to the hearers that the plaintiff had [*114] purposely set fire to his own premises with intent to defraud the insurance office. There being no such averment, the Court arrested judgment.

Sweetapple v *Jesse*, 5 B. & Ad. 27; 2 N. & M. 36.

"She secreted one and sixpence under the till, stating, 'These are not times to be robbed.'" No innuendo. There being nothing to show that the 1*s.* 6*d.* was not her own money, the Court arrested judgment; for, though special damage was alleged, it was not the necessary and natural consequence of the words, as set out in the declaration.

Kelly v. *Partington*, 5 B. & Ad. 645; 3 N. & M. 116, *ante*, p. 90.

The plaintiff, Mary Griffiths, was a butcher and had a son, Matthew. Words spoken by defendant:—"Matthew uses two balls to his mother's steelyard;" innuendo, "meaning that plaintiff by Matthew, her agent and servant, used improper and fraudulent weights in her said trade, and defrauded and cheated in her said trade." After verdict for the plaintiff, held that the words, as stated and explained, were actionable.

Griffiths v. *Lewis*, 7 Q. B. 61; 8 Q. B. 841; 14 L. J. Q. B. 197; 15 L. J. Q. B. 249; 9 Jur. 370; 10 Jur. 711.

To say that the plaintiff is "Man Friday" to another is not actionable, without an innuendo averring that the term imputed undue subserviency and self-humiliation.

Forbes v. *King*, 2 L. J. Ex. 109; 1 Dowl. 672.

See *Woodgate* v. *Ridout*, 4 F. & F. 202.

Words complained of:—"The old materials have been relaid by you in the asphalte work executed in the front of the Ordnance Office, and I have seen the work done." Innuendo, "that the plaintiff had been guilty of dishonesty in his trade by laying down again the old asphalte which had before been used at the entrance of the Ordinance Office, instead of new asphalte according to his contract;" and this innuendo was held not too large. Verdict for the plaintiff. Damages 40*s.*

Babonean v. *Farrell*, 15 C. B. 360; 24 L. J. C. P. 9; 3 C. L. R. 42; 1 Jur. N. S. 114.

An action was brought for the following libel on the plaintiff in the way of his trade:—"Society of Guardians for the Protection of Trade against Swindlers and Sharpers. I am directed to inform you that the persons using the firm

of Goldstein and Co. are reported to this Society as improper to be proposed to be balloted for as members thereof." After verdict for the plaintiff, the Court arrested judgment, because there was no averment that it was the custom of the Society to designate swindlers and sharpers by the term "improper persons to be members of this Society." [There was an innuendo, "meaning thereby that the plaintiff was a swindler and a sharper, &c.," which would be sufficient now; but before the C. L. P. Act, 1852, s. 61, an innuendo required a prefatory averment to support it.] The words in their natural and obvious meaning were held to be no libel.

Goldstein v. *Foss*, 6 B. & C. 154; 1 M. & P. 402; 2 Y. & J. 146; 9 D. & R. 197; (in Ex. Ch.) 4 Bing. 489; 2 C. & P. 252.

Capel and others v. *Jones*, 4 C. B. 259; 11 Jur. 396.

To say of a merchant, "He hath eaten a spider," Mr. Justice Wild said was [*115] "actionable with a proper averment what the meaning is." But the report does not vouchsafe any explanation of the meaning.

Franklyn v. *Butler*, Pasch. 11 Car. I., cited in *Annison* v. *Blofield*, Carter, 214.

The words "'Ware hawk there; mind what you are about," will, with proper averments, amount to a charge of insolvency against the plaintiff, a trader; and so are actionable.

Orpwood v. *Barkes* (*rel Parkes*), 4 Bing. 261; 12 Moore, 492.

The plaintiff was a grocer, and had started what is known as a Christmas club, to which he endeavoured to obtain 1,000 subscribers. The defendant, a fellow tradesman, said "His shop is in the market." Innuendo: "meaning thereby that the plaintiff was going away, and was guilty of fraudulent conduct in his business, inasmuch as he had received subscriptions from members of the club, well knowing that they would be unable to obtain any benefit therefrom." *Held*, that, the words not being in themselves defamatory, and there being no evidence to support the innuendo, the defendant was entitled to judgment.

Ruel v. *Tatnell*, 43 L. T. 507; 29 W. R. 172.

The defendant said to an upholsterer:—"You are a soldier; I saw you in your red coat doing duty; your word is not to be taken." These words are *primâ facie* not actionable; but it was explained that there was then a common practice for tradesmen to sham enlisting so as to avoid being arrested for debt. The words were therefore held actionable as damaging the credit of a trader.

Arne v. *Johnson*, 10 Mod. 111.

Gostling v. *Brooks*, 2 F. & F. 76.

The defendant said of the plaintiff:—"Foulger trapped three foxes in Ridler's wood." These words are *primâ facie* not actionable; but the declaration averred that the plaintiff was a gamekeeper, that it is the duty of a gamekeeper not to kill foxes, that the plaintiff was employed expressly on the terms that he would not kill foxes, and that no one who killed foxes would be employed as a gamekeeper. *Held*, on demurrer, a good declaration; for the words, so explained, clearly imputed to the plaintiff misconduct in his office or occupation, and were therefore actionable without proof of special damage.

Foulger v. *Newcomb*, L. R. 2 Ex. 327; 36 L. J. Ex. 169; 15 W. R. 1181; 16 L. T. 595.

But an indictment for publishing a handbill, "B. Oakley of Chillington, Game and Rabbit Destroyer, and his wife, the seller of the same in country and town," was quashed, there being no innuendo explaining the words or showing that they implied any offence or referred to the trade or calling of the prosecutor.

Reg. v. *James Yates*, 12 Cox, C. C. 233.

A landlord sent to his tenants a notice:—"Messrs. Henty & Sons hereby give notice that they will not receive in payment any cheques drawn on any of the branches of the Capital and Counties Bank." Innuendo, "meaning thereby that the plaintiffs were not to be relied upon to meet the cheques drawn upon them, and that their position was such that they were not to be trusted to cash the cheques of their customers." *Held*, that the words in their natural and primary sense were not libellous; that the onus lay on the bank to show that they conveyed some secondary libellous meaning; and that as no evidence was offered of facts known to the tenants which could reasonably induce them to

understand the words in the defamatory sense ascribed to them by the innuendo, [* 116] there was no case to go to the jury, and the defendants were entitled to judgment.

Capital and Counties Bank v. *Henty and Sons* (C. A.), 5 C. P. D. 514; 49 L. J. C. P. 830; 28 W. R. 851; 43 L. T. 651; (H. L.) 7 App. Cas. 741; 52 L. J. Q. B. 232; 31 W. R. 157; 47 L. T. 662; 47 J. P. 214.

Defendant posted up several placards which ran thus:—"W. Gee, Solicitor, Bishop's Stortford. To be sold by auction, if not previously disposed of by private contract, a debt of the above, amounting to £3,197, due upon partnership and mortgage transactions." There was no innuendo. Bramwell, B., told the jury that in his opinion this was no libel, "because it was not libellous to publish of another that he owed money;" and the jury returned a verdict of Not guilty.

R. v. *Coghlan*, 4 F. & F. 316.

The plaintiff may also aver in his statement of claim that the words were spoken ironically; and it will then be a question for the jury *quo animo* the words were used.

Illustrations.

Ironical praise may be a libel; *e. g.*, calling an attorney "an honest lawyer."

Boydell v. *Jones*, 4 M. & W. 446; 1 H. & H. 408; 7 Dowl. 210.

It is actionable to say ironically, "*You* will not play the Jew or the hypocrite."

R. v. *Garret* (*Sir Baptist Hicks' Case*), Hob. 215; Popham, 139.

Ironical advice to the Lord Keeper by a country parson, "to be as wise as Lord Somerset, to manage as well as Lord Haversham, to love the church as well as the Bishop of Salisbury," &c., is actionable.

R. v. *Dr. Brown*, 11 Mod. 86; Holt, 425.

5. *Words incapable of a Defamatory Meaning.*

But where the words can bear but one meaning, and that is obviously not defamatory, then no innuendo or other allegation on the pleadings can make the words defamatory; no action lies; and the judge at the trial will nonsuit the plaintiff and not permit the case to go to the jury. No parol evidence is admissible to explain the meaning of ordinary English words, in the absence of special circumstances showing that in the case before the Court the words do not bear their usual signification. "It is not right to say that a judge is to affect not to know what everybody [* 117] else knows—the ordinary use of the English language." (Per Brett, J., 1 C. P. D. 572.) The fact that actual damage has in fact followed from the publication is immaterial in considering what is the true construction of the libel. (Per Lord Coleridge, C. J., 2 C. P. D. 150.) Except, perhaps, as showing that one person at all events understood the words in a defamatory sense. "It shall be adjudged *ex effectu dicendi*." (Per Jones and Croke, JJ., in *Southold* v. *Daunston*, Cro. Car. 269.)

Illustrations.

Words complained of:—"He was the ringleader of the nine hours' system." "He has ruined the town by bringing about the nine hours' system," &c. The declaration contained no innuendo, and no sufficient averment that the

words were spoken of the plaintiff in the way of his trade, and on demurrer, was held bad.

Miller v. *David*, L. R. 9 C. P. 118; 43 L. J. C. P. 84; 22 W. R. 332; 30 L. T. 58.

Words complained of:—"We are requested to state that the honorary secretary of the Tichborne Defence Fund is not and never was a captain in the Royal Artillery as he has been erroneously described." Innuendo, that the plaintiff was an impostor, and had falsely and fraudulently represented himself to be a captain in the Royal Artillery. Bovill, C. J., held that the words were not reasonably capable of the defamatory meaning ascribed to them by the innuendo, and nonsuited the plaintiff. *Held*, that the nonsuit was right.

Hunt v. *Goodlake*, 43 L. J. C. P. 54; 29 L. T. 472.

The plaintiff was a certificated art master, and had been master at the Walsall Science and Art Institute. His engagement there ceased in June, 1874, and he then started, and became master of, another school which was called "The Walsall Government School of Art," and was opened in August. In September the following advertisement appeared in the Walsall *Observer*, signed by the defendants as chairman, treasurer, and secretary of the institute respectively:—"Walsall Science and Art Institute. The public are informed that Mr. Mulligan's connection with the Institute has ceased, and that he is not authorized to receive subscriptions on its behalf." The declaration set out this advertisement with an innuendo,—"meaning thereby that the plaintiff falsely assumed and pretended to be authorized to receive subscriptions on behalf of the said Institute." At the trial Quain, J., directed a nonsuit on the ground that the advertisement was not capable of the defamatory meaning attributed by the innuendo:—*Held*, that the nonsuit was right; that the advertisement was not capable of any defamatory meaning.

Mulligan v. *Cole and others*, L. R. 10 Q. B. 549; 44 L. J. Q. B. 153; 33 L. T. 12.

Brent v. *Spratt*, Times for Feb. 3rd, 1882, *ante*, p. 78.

Raven v. *Stevens and Sons*, 3 Times L. R. 67.

[*118.] CERTAINTY.

But even where the meaning of the defendant's words is clear or has been ascertained, the question remains:—Has he said enough? Was the imputation sufficiently definite to injure the plaintiff's reputation? Is it clear that it is the plaintiff to whom it referred? Unless these questions can be answered in the affirmative, no action lies. There must be a specific imputation cast on the person suing.

"In every action on the case for slanderous words, two things are requisite:

1. That the person who is scandalized is certain;

2. That the scandal is apparent by the words themselves . . . As an innuendo cannot make the person certain which was uncertain before, so an innuendo cannot alter the matter or sense of the words themselves." (*James* v. *Rutlech*, 4 Rep. 17 a.)

This is clearly only a part of the construction of the words; but it is convenient to collect the cases under a separate head, which may be denoted by the well-known pleading phrase, Certainty. Often the only question of construction arising in a case may be one of certainty.

The court formerly expected to be assisted in dealing with these

questions by a variety of minute averments in the plaintiff's declaration. Thus, it was necessary that there should be a *colloquium*, an averment that the defendant was speaking of the plaintiff, as well as constant innuendoes in the statement of the words themselves, "he (meaning thereby the plaintiff).". So, too, many other allegations were required describing the locality, the relationship between the various persons mentioned, and all the surrounding circumstances necessary to fully understand the defendant's words. And these matters could not properly be proved at the trial unless they were set out on the record; or if they were, and the plaintiff had a verdict, the Court would subsequently arrest judgment, on the ground that it did not appear clearly on the face of the record that the words [*119] were actionable. And this technicality was carried to an absurd extent. Thus, where the defendant said, "Thou art a murderer, for thou art the fellow that didst kill Mr. Sydnam's man," the Court of Exchequer Chamber, on error brought, arrested judgment, because there was no averment that any man of Mr. Sydnam's had in fact been killed. (*Barrons* v. *Ball* (161 .), Cro. Jac. 331. See *Ratcliff* v. *Michael, ib.;* and *Upton* v. *Pinfold*, Comyns, 267.) Had the words been "*and* thou art," instead of "*for* thou art," the plaintiff would probably have been allowed to recover. (See *Minors* v. *Leeford*, Cro. Jac. 114.) Again, in *Ball* v. *Roane* (1593), Cro. Eliz. 308 the words were: "There was never a robbery committed within forty miles of Wellingborough but thou hadst thy part in it." After a verdict for the plaintiff, the Court arrested judgment, "Because it was not averred there *was* any robbery committed within forty miles, etc., for otherwise it is no slander." So in *Foster* v. *Browning* (1625), Cro. Jac, 688, where the words were, "Thou art as arrant a thief as any is in England," the Court arrested judgment, because the plaintiff had not averred "that there was any thief in England." (See also *Johnson* v. *Sir John Aylmer*, Cro. Jac. 126; *Sir Thomas Holt* v. *Astrigg*, Cro. Jac. 184; *Slocomb's Case*, Cro. Car. 442.) But the climax was reached in a case cited by *Dacy* v. *Clinch* (1661), Sid. 53, where the defendant had said to the plaintiff, "As sure as God governs the world, or King James this kingdom, you are a thief." After verdict for the plaintiff, the defendant moved in arrest of judgment, on the ground that there was no averment on the record that God did govern the world, or King James this kingdom. But here the Court drew the line, and held that "these things were so apparent" that neither of them need be averred. And even in the present century instances of similar technicality are not wanting, though their absurdity is not so flagrant. Thus, in *Solomon* v. *Lawson*, 8 Q. B. 823; 15 L. J. Q. B. 253; 10 Jur. 796, the libel consisted of two letters to the *Times;* the first made a charge generally on "the authorities" at St. Helena; the second letter brought it home to the plaintiff in particular. Neither letter was thus a complete libel in itself. In the first count of the declaration the first letter was fully set out; in the second count *both* letters were set out *verbatim*. The first count was held bad, because it set out only half the libel. The second count was also held bad because the pleader in set-

ting out the first letter for the second time had introduced it with the words "in *substance* as follows." The Court decided that it ought to have been set out *verbatim:* so it was; but because the pleader *said* he had only set out the substance, judgment was arrested. Lord Denman would, it [*120] seems, have given judgment for the plaintiff had the pleader used the word "*tenour*" instead of "*substance.*" So, too, in *Angle* v. *Alexander*, 7 Bing. 119; 1 Cr. & J. 143; 4 M. & P. 870; 1 Tyrw. 9, the words were thus set out with innuendoes in the declaration: "You (meaning the said plaintiff) are a regular prover under bankruptcy (meaning that the said plaintiff was accustomed to prove fictitious debts under commissions of bankruptcy); you are a regular bankrupt maker; if it was not for some of your neighbors your shop would look queer." And the Court arrested judgment because there was no prefatory averment that the defendant had been accustomed to employ the words "prover under bankruptcy" in the meaning set out in the innuendo. (See also *Goldstein* v. *Foss and another*, 6 B. & C. 154; 4 Bing. 479; 9 D. & R. 197; 2 C. & P. 252; 1 M. & P. 402; 2 Y. & J. 146; and other cases cited *ante*, p. 102.)

But now by sect. 61 of the Common Law Procedure Act, 1852, the *colloquium* and all other such frivolous averments are rendered unnecessary; and Order XIX. r. 4, requires that only material facts need be stated in the pleadings. The pleader must judge what facts are material; and he will also insert averments which, though not essential, will help to make the case clear, by explaining what is to follow (as in *Foulger* v. *Newcomb*, L. R. 2 Ex. 327; 36 L. J. Ex. 169; 15 W. R. 1181; 16 L. T. 595). But where the plaintiff is suing for words spoken of him in the way of his office, profession, or trade, there it is absolutely necessary to aver that at the time when the words were spoken the plaintiff held such office, or carried on such profession or trade. And there should also be an averment that the words were spoken by the defendant with reference to such office, profession, or trade.

1. *Certainty of the Imputation.*

Where words are sought to be made actionable, as charging the plaintiff with the commission of a crime, we have seen that a criminal offence must be specifically imputed. It will not be sufficient to prove words which only amount to an accusation of fraudulent, dishonest, vicious or immoral conduct, so long as it is not criminal; or of a mere intention to commit a crime, not evidenced by any overt act. But still it is not necessary that the [*121] alleged crime should be stated with all the technicality or precision of an indictment, if the crime be imputed in the ordinary language usually employed to denote it in lay conversation. All that is requisite is that the bystanders should clearly understand that the plaintiff is specially charged with the commission of a crime. "The meaning of the words is to be gathered from the vulgar import, and not from any technical legal sense." (Per Buller, J., in *Colman* v. *Godwin*, 3 Dougl. 91; 2 B. & C. 285, *n.*)

Illustrations.

Treason.

The following words have been held sufficiently definite to constitute a charge of treason, or at least of sedition, and therefore actionable :—

" Thy master is no true subject."

Waldegrave v. *Agas*, Cro. Eliz. 191 ; 1 Roll. Abr. 75.

Sed quære, *Fowler* v. *Aston*, Cro. Eliz. 268 ; 1 Roll. Abr. 43.

" Thou hast committed treason beyond the seas ; " for there is a violent intendment that he committed treason to the State here, and not to a foreign State.

Lewis v. *Coke*, Cro. Jac. 424.

" He consented to the late rebels in the North."

Stapleton v. *Frier*, Cro. Eliz. 251.

" Thou art a rebel, and all that keep thee company are rebels, and thou art not the Queen's friend."

Redston v. *Eliot*, Cro. Eliz. 638 ; 1 Roll. Abr. 49.

" Thou art an enemy to the State."

Charter v. *Peter*, Cro. Eliz. 602.

" He has the pretender's picture in his room, and I saw him drink his health. And he said he had a right to the crown."

Fry v. *Carne* (1724), 8 Mod. 283.

How v. *Prin* (1702), Holt, 652 ; 7 Mod. 107 ; 2 Ld. Raym. 812 ; 2 Salk. 694 ; 1 Brown, Py. C. 64.

" Thou hast made a seditious sermon, and moved the people to sedition this day."

Philips (*B. D.*) v. *Budby*, 1582, cited 4 Rep. 19.

But to say merely " Thou art a rebel," was adjudged not actionable.

Fountain v. *Rogers* (1601), Cro. Eliz. 878.

Murder.

So it is a sufficient charge of murder to say :—

" Thou hast killed thy master's cook."

Cooper v. *Smith*, Cro. Jac. 423 ; 1 Roll. Abr. 77.

" I am thoroughly convinced that you are guilty of the death of Daniel Dolly, and rather than you should want a hangman, I will be your executioner."

Peake v. *Oldham*, Cowp. 275 ; 2 Wm. Bl. 959.

[*122] But it is not sufficient to say :—

" Hext seeks my life." " Because he may seek his life lawfully upon just cause."

Hext v. *Yeomans*, 4 Rep. 15.

" He was the cause of the death of Dowland's child," because a man might innocently cause the death of another by accident or misfortune.

Miller v. *Buckdon*, 2 Buls. 10.

" Thou wouldst have killed me," for here a murderous *intention* only is imputed.

Dr. Poe's Case, 1 Vin. Abr. 440, cited in 2 Buls. 206.

Forgery.

The following words have been held a sufficient charge of forgery :—

" This is a counterfeit warrant made by Mr. Stone."

Stone v. *Smalcombe*, Cro. Jac. 648.

" Thou hast forged a privy seal, and a commission." *Per cur.* " ' A commission ' shall be intended the king's commission, under the privy seal."

Beal v. *Baggerley*, Cro. Car. 326.

" You forged my name," although it is not stated to what deed or instrument.

Jones v. *Herne*, 2 Wils. 87.

Overruling *Anon.*, 3 Leon. 231 ; 1 Roll. Ab. 65.

Arson.

"*I* never set *my* premises on fire," was held sufficiently clear in
Cutler v. *Cutler*, 10 J. P. 169.
But see *Streetapple* v. *Jesse*, 5 B. & Ad. 27 ; 2 N. & M. 36.
Barham's Case, 4 Rep. 20 ; Yelv. 21.

Embezzlement.

"He made a few hundreds in my service—God only knows whether honestly or otherwise," is a sufficient imputation of embezzlement.
Clegg v. *Laffer*, 3 Moore & Sc. 727 ; 10 Bing. 250.

Larceny.

The following words are a sufficient charge of larceny :—
"Baker stole my box-wood, and I will prove it." It was argued that it did not appear from the words that the box-wood was not growing ; and that to cut down and remove growing timber is a trespass only, not a larceny. But the Court gave judgment for the plaintiff, holding that "ex vi termini" stealing "did import felony."
Baker v. *Pierce*, 6 Mod. 23 ; 2 Salk. 695 ; Holt, 654.
Overruling *Mason* v. *Thompson*, Hutt. 38.
Gybbons asked May : "Have you brought home the forty pounds you stole?" *Held* that an action lay.
May v. *Gybbons*, Cro. Jac. 568.
"Thou hast stolen our bees, and thou art a thief." After verdict it was contended that larceny cannot be committed of bees, unless they be hived ; but the [*123] Court held that the subsequent words "thou art a thief" showed that the larceny imputed was of such bees as could be stolen.
Tibbs v. *Smith*, 3 Salk. 325 ; Sir Thos. Raym. 33.
Minors v. *Leeford*, Cro. Jac. 114.
"Thou art a corn-stealer" held sufficient.
Anon. (1597), Cro. Eliz. 563.
Smith v. *Ward* (1624), Cro. Jac. 674.
So a charge of being "privy and consenting to" a larceny is actionable.
Mot et ux v. *Butler*, Cro. Car. 236.
"He is a pickpocket ; he picked my pocket of my money," was once held an insufficient charge of larceny.
Watts v. *Rymes*, 2 Lev. 51 ; 1 Ventr. 213 ; 3 Salk. 325.
But now this would clearly be held sufficient.
Baker v. *Pierce supra* ; 2 Ld. Raym. 959.
Stebbing v. *Warner*, 11 Mod. 255.
"He was put into the round-house for stealing ducks at Crowland."
Beacor v. *Hides*, 2 Wilson, 300.
"You have been cropped for felony."
Wiley v. *Campbell*, 5 Monroe (19 Kentucky), 396.

But it is not actionable in America to say—
"You as good as stole the canoe."
Stokes v. *Arey*, 8 Jones, 46.
Or, "A man that would do that would steal."
Stees v. *Kemble*, 27 Penn. St. 112.

Receiving Stolen Goods.

To say, "I have been robbed of three dozen winches ; you bought two, one at 3*s*., one at 2*s*. ; you knew well when you bought them that they cost me three times as much making as you gave for them, and that they could not have been honestly come by," is a sufficient charge of receiving stolen goods, knowing them to have been *stolen*.
[An indictment which merely alleged that the prisoner knew the goods were not honestly come by would be bad. *R.* v. *Wilson*, 2 Mood. C. C. 52.]
Alfred v. *Farlow*, 8 Q. B. 854 ; 15 L. J. Q. B. 258 ; 10 Jur. 714.

Clarke's Case de Dorchester, 2 Rolle's Rep. 136.
King v. *Bagg*, Cro. Jac. 331.

Bigamy.

Mrs. Heming was sister to Mr. Alleyne. The defendant said :—"It has been ascertained beyond all doubt that Mr. Alleyne and Mrs. Heming are not brother and sister, but man and wife." *Held*, that it was open to the jury to construe this as a charge of bigamy, as well as of incest.
Heming and wife v. *Power*, 10 M. & W. 564.

Perjury.

"You are forsworn," without more, is insufficient.
Stanhope v. *Blith* (1585), 4 Rep. 15.
Holt v. *Scholefield*, 6 T. R. 691.
Hall v. *Weedon*, 8 D. & R. 140.

[* 124] But to say they "did not scruple to turn affidavit-men," is sufficient.
Roach v. *Garvan*, *Re Read and Huggonson*, (1742), 2 Atk. 469 ; 2 Dick. 794.

"Thou art forsworn in a court of record, and that I will prove!" was held sufficient ; though it was argued after verdict that he might only have been talking in the court-house and so forsworn himself ; but the Court held that the words would naturally mean forsworn while giving evidence in some judicial proceeding in a court of record.
Ceely v. *Hoskins*, Cro. Car. 509.

Plaintiff had recently given evidence in an action against defendant, who thereupon wrote and published of him :—"The man at the sign of the Bible is no slouch at swearing to an old story." *Held*, that if these words did not amount to a charge of actual perjury, they at least imputed that he swore with levity without due regard to the solemnity of an oath ; and therefore, being written, were actionable.
Steele v. *Southwicke*, 9 Johns, (New York) 214 ; see *post*, p. 132.

False Pretences.

The words "He has defrauded a mealman of a roan horse," held not to imply a criminal act of fraud ; as it is not stated that the mealman was induced to part with his property by means of any false pretence.
Richardson v. *Allen*, 2 Chit. 657.
Needham v. *Dowling*, 15 L. J. C. P. 9.

Attempt to Commit a Felony.

The following words were held sufficient :—
"He sought to murder me and I can prove it."
Preston v. *Pinder*, Cro. Eliz. 308.
"She would have cut her husband's throat and did attempt it."
Scot et ux. v. *Hilliar*, Lanc, 98 ; 1 Vin. Abr. 440.

The following insufficient :—
"Thou wouldst have killed me."
Dr. Poe's Case, cited in *Murrey's Case*, 2 Buls. 206 ; 1 Vin. Abr. 440.
"Sir Harbert Crofts keepeth men to rob me."
Sir Harbert Crofts v. *Brown*, 3 Buls. 167.
"He would have robbed me."
Stoner v. *Audely*, Cro. Eliz. 250.
For here no overt act is charged, and mere intention is not criminal.
Eaton v. *Allen*, 4 Rep. 16 b ; Cro. Eliz. 684.

Other instances of a criminal charge indirectly made will be found in
Snell v. *Webling*, 2 Lev. 150 ; 1 Vent. 276.
Woolnoth v. *Meadows*, 5 East, 463 ; 2 Smith, 28.

Where words clearly refer to the plaintiff's office and his conduct therein, or otherwise clearly touch and injure him therein, it is unnecessary that the defendant should [*125] expressly name his office or restrict his words thereto; it shall be intended that he was speaking of him in the way of his office or trade.

Illustrations.

To say of a clerk, "He cozened his master" is actionable, though the defendant did not expressly state that the cozening was done in the execution of the clerk's official duties; that will be intended.

Reignald's Case (1640), Cro. Car. 563.

Reeve v. *Holgate*, (1672), 2 Lev. 62.

To say of a trader, "He has been arrested for debt," is actionable, though no express reference be made to his trade at the time of publication; for such words must necessarily affect his credit in his trade.

Jones v. *Littler*, 7 M. & W. 423; 10 L. J. Ex. 171.

It is not necessary that the defendant should in so many words expressly state the plaintiff has committed a particular crime. So, where a charge is made against a trader, it need not be conveyed in positive and direct language. Any words which distinctly assume or imply the plaintiff's guilt, are sufficient. But words merely imputing to the plaintiff a criminal intention or design are not actionable, so long as no criminal act is directly or indirectly assigned. So, too, words of mere suspicion, not amounting to a charge of felony, are not actionable; and no innuendo can make them so. (See *ante*, pp. 57, 58.)

Illustrations.

The following words have been held to convey an imputation with sufficient certainty and precision:—

"I believe all is not well with Daniel Vivian; there be many merchants who have lately failed, and I expect no otherwise of Daniel Vivian;" for this is a charge of present pecuniary embarrassment.

Vivian v. *Willet*, 3 Salk. 326; Sir Thos. Raym. 207.

"Two dyers are gone off, and for aught I know Harrison will be so too within this twelvemonth."

Harrison v. *Thornborough*, 10 Mod. 196; Gilb. Cas. 114.

"He has become so inflated with self-importance by the few hundreds made in my service—God only knows whether honestly or otherwise;" for this is an insinuation of embezzlement.

Clegg v. *Laffer*, 3 Moore & Sc. 727; 10 Bing. 250.

[*126] "I think in my conscience if Sir John might have his will, he would kill the king;" for this is a charge of compassing the king's death.

Sidnam v. *Mayo*, 1 Roll. Rep. 427; Cro. Jac. 407.

Peake v. *Oldham*, Cowp. 275; 2 Wm. Bl. 959, *ante*, p. 121.

"Thou art a corn-stealer;" in spite of the objection "that it might be that the corn was growing, and so no felony."

Anon. (1597), Cro. Eliz. 563.

So where the defendant, on hearing that his barns were burnt down, said, "I cannot imagine who it should be but the Lord Sturton."

Lord Sturton v. *Chaffin* (1563), Moore, 142.

To state that criminal proceedings are about to be taken against the plaintiff (*e. g.*, that the Attorney-General had directed a certain attorney to prosecute him for perjury), is actionable, although the speaker does not expressly assert that the plaintiff is guilty of the charge.

Roberts v. *Camden*, 9 East, 93.

Tempest v. *Chambers*, 1 Stark. 67.

But where the defendant said, "I have a suspicion that you and B. have robbed my house, and therefore I take you into custody," the jury found that the words did not amount to a direct charge of felony, but only indicated what was passing in defendant's mind. *Ante*, p. 58.

Tozer v. *Mashford*, 6 Ex. 539; 20 L. J. Ex. 225.

Harrison v. *King*, 4 Price, 46; 7 Taunt. 431; 1 B. & Ald. 161.

No action lies for such words as "Thou deservest to be hanged;" for here no fact is asserted against the plaintiff.

Hake v. *Molton*, Roll. Abr. 43.

Cockaine v. *Hopkins*, 2 Lev. 214.

But it is actionable to say, "I am of opinion that such a Privy Councillor is a traitor," or "I think such a judge is corrupt." Per Wyndham and Scroggs, JJ., and North, C. J., in

Lord Townshend v. *Dr. Hughes*, 2 Mod. 166.

So, too, if the charge incidentally slips into a conversation on another matter, an action lies; as where the defendant said, "Mr. Wingfield, you never thought well of me since Graves did steal my lamb;" and it was held that Graves could sue.

Graves' Case, Cro. Eliz. 289.

Or, "I dealt not so unkindly with you when you stole a sack of my corn."

Cooper v. *Hawkeswell*, 2 Mod. 58.

A libellous charge may be insinuated in a question: *e. g.*, "We should be glad to know how many popish priests enter the nunneries at Scorton and Darlington each week? and also how many infants are born in them every year, and what becomes of them? whether the holy fathers bring them up or not, or whether the innocents are murdered out of hand or not" Alderson, B., directed the jury that if they thought the defendant by asking the question meant to *assert* the facts insinuated, the passage was a libel.

R. v. *Gathercole*, 2 Lew. C. C. 237, 255.

Though the sentence be in the form of a question, the words may amount to an affirmative charge.

Nelson v. *Staff*, Cro. Jac. 422.

May v. *Gybbons*, Cro. Jac 568.

But see *Barnes* v. *Holloway*, 8 T. R. 150.

[* 127] So a slander may be conveyed in a question and answer, or in a series of questions and answers.

Gainford v. *Tuke* (1620), Cro. Jac. 536.

Haywood v. *Nayler* (1636), 1 Roll. Abr. 50.

Ward v. *Reynolds* (1714), cited Cowp. 278.

A libellous charge may be sufficiently conveyed by a mere adjective. (*Osborn* v. *Pool*, 1 Ld. Raym. 236.)

"Thou art a leprous knave."

Taylor v. *Perkins*, Cro. Jac. 144; 1 Roll. Abr. 44.

"He is a bankrupt knave," spoken of a trader.

Squire v. *Johns*, Cro. Jac. 585.

Loyd v. *Pearse*, Cro. Jac. 424.

"Thou art a broken fellow."

Anon., Holt, 652.

"Mr. Bittridge is a perjured old knave."

Bittridge's Case, 14 Rep. 19.

Croford v. *Blisse*, 2 Buls. 150.

"A libellous journalist," a phrase which will be taken to mean that the plaintiff *habitually* publishes libels in his paper, not that he *once* published *one* libel merely.

Wakley v. *Cook and Healey*, 4 Exch. 511; 19 L. J. Ex. 91.

So if the defendant is obviously only repeating gossip, not asserting the charge as a fact within his own knowledge.

"I heard you had run away" (*sc.* from your creditors).

Davis v. *Lewis*, 7 T. R. 17.

" Thou art a sheep-stealing rogue, and Farmer Parker told me so."
Gardiner v. *Atwater*, Sayer, 265.

" One told me that he heard say that Mistress Meggs had poisoned her first husband."
Meggs v. *Griffith* (*vel Griffin*), Cro. Eliz. 400; Moore, 408.
Read's Case, Cro. Eliz. 645.

" Did you not hear that C. is guilty of treason ?"
Per. cur. in *Earl of Northampton's Case*, 12 Rep. 134.

2. *Certainty as to the Person defamed.*

The defamatory words must refer to some ascertained or ascertainable person, and that person must be the plaintiff.

If the words used really contain no reflection on any particular individual, no averment or innuendo can make them defamatory. " An innuendo cannot make the person certain which was incertain before." (4 Rep. 17 a.)

Illustrations.

[*128] " Suppose the words to be ' a murder was committed in A.'s house last night ; ' no introduction can warrant the innuendo ' meaning that B. committed the said murder ; ' nor would it be helped by the finding of the jury for the plaintiff. For the Court must see that the words do not and cannot mean it, and would arrest the judgment accordingly. *Id certum est, quod certum reddi potest.*" Per Lord Denman, C. J., in
Solomon v. *Lawson*, 8 Q. B. 837 ; 15 L. J. Q. B. 257; 10 Jur. 796.

" If a man wrote that all lawyers were thieves, no particular lawyer could sue him, unless there is something to point to the particular individual." Per Willes, J., in
Eastwood v. *Holmes*, 1 F. & F. 349.

To assert that an acceptance is a forgery is no libel on the drawer, unless it somehow appear that it was he who was charged with forging it.
Stockley v. *Clement*, 4 Bing. 162; 12 Moore, 376

The defendant in a speech commented severely on the discipline of the Roman Catholic church, and the degrading punishments imposed on penitents. He read from a paper an account given by three policemen of the severe penance imposed on a poor Irishman. It appeared incidentally from this report that the Irishman had told the policemen that his priest would not administer the Sacrament to him till the penance was performed. The plaintiff averred that he was the Irishman's priest, but it did not appear how enjoining such a penance on an Irishman would affect the character of a Roman Catholic priest. The alleged libel was in no other way connected with the plaintiff. *Held*, no libel, and no slander, of the plaintiff.
Hearne v. *Stowell*, 12 A. & E. 719 ; 6 Jur. 458 ; 4 P. & D. 696.

Though the words used may at first sight appear only to apply to a class of individuals, and not to be specially defamatory of any particular member of that class, still an action may be maintained by any one individual of that class who can satisfy the jury that the words referred especially to himself. The words must be capable of bearing such special application, or the judge should stop the case. And there must be an averment in the statement of claim, that the words were spoken of the plaintiff. The plaintiff may also aver extraneous facts, if any, showing that he was the person expressly referred to.

Formerly it was absolutely necessary, as we have seen, to overload the pleadings with averments, such as, that the defendant was talking to J.S. about the plaintiff, and about the plaintiff's conduct in

and about a certain matter; and that in the course of such conversation he spoke of and concerning the plaintiff, and of and concerning the [*129] said matter, the words following—that is to say, &c. A great many other details had to be formally set out in order to support the subsequent brief innuendo, "he (meaning the plaintiff)." And then, too, the introductory averments had to be properly connected with the innuendo, or their presence was of no avail. (*Clement* v. *Fisher*, 7 B. & C. 459; 1 M. & R. 281.) But now all such pitfalls are removed by the Common Law Procedure Act, 1852, s. 61. No such averments are any longer necessary; the innuendo alone is sufficient. (*Turner* v. *Merywçather*, 7 C. B. 251; 18 L. J. C. P. 155; 13 Jur. 683; and in error, 19 L. J. C. P. 10.) And the decision of the jury on the point is final. After a verdict for the plaintiff, the defendant can no longer argue that it does not sufficiently appear to whom the words relate.

And this is no breach of the rule that the office of the innuendo is to explain, and not to extend, the sense of the defamatory matter. For here the innuendo does not extend the meaning, it only points out the particular individual to whom the matter in itself defamatory does in fact apply.

So, if the words spoken or written, though plain in themselves, apply equally well to more persons than one, evidence may be given both of the cause and occasion of publication, and of all the surrounding circumstances affecting the relation between the parties, and also of any subsequent article referring to the former one or of any statement or declaration made by the defendant as to the person referred to. (*Barwell* v. *Adkins*, 1 M. & Gr. 807; 2 Scott, N. R. 11; *Knapp* v. *Fuller*, 55 Vermont, 311; 45 Amer. R. 618.) The plaintiff may also call at the trial his friends, or those acquainted with the circumstances, to state that on reading the libel they at once concluded that it was aimed at the plaintiff. (*Bourke* v. *Warren*, 2 C. & P. 307; *Broome* v. *Gosden*, 1 C. B. 728.) If the application to a particular individual can be generally perceived, the publication is a libel on him, however general its language may be. "Whether a man is called by one name, or whether he is called by another, or whether he is described by a pretended description of a class to which he is known to belong, if those who look on know well who is aimed at, [*130] the very same injury is inflicted, the very same thing is in fact done, as would be done if his name and Christian name were ten times repeated." (Per Lord Campbell, C. J., in *Le Fanu and another* v. *Malcolmson*, 1 H. L. C. 668.)

Where the libel consists of an effigy, picture, or caricature, care should be taken to show by proper innuendoes and averments the libellous nature of the representation, and its especial reference to the plaintiff. It is often in such cases difficult for the plaintiff to prove that he is the person caricatured.

Illustrations.

Where plaintiff's house had been insured and burnt down, and the insur-

ance company at first demurred to pay, but ultimately did pay, the insurance money, and defendant subsequently, in the course of a quarrel with the plaintiff, said, in the presence of others, "I never set my premises on fire," and "I was never accused of setting my premises on fire," this was held to be a slander on the plaintiff.

Cutler v. *Cutler*, 10 J. P. 169.
And see *Snell* v. *Webling*, 2 Lev. 150.
Clerk v. *Dyer*, 8 Mod. 290.

Words complained of :— "We would exhort the medical officers to avoid the traps set for them by desperate adventurers (innuendo, thereby meaning the plaintiff among others), who, participating in their efforts, would inevitably cover them with ridicule and disrepute." The jury found that the words were intended to apply to the plaintiff. Judgment accordingly for the plaintiff.

Wakley v. *Healey*, 7 C. B. 591 ; 18 L. J. C. P. 241.

A newspaper article imputed that "in some of the Irish factories" cruelties were practised upon the workpeople. Innuendo, "in the factory of the plaintiffs," who were manufacturers. The jury were satisfied that the newspaper was referring especially to the plaintiffs' factory, and found a verdict for the plaintiffs, and the House of Lords held the declaration good.

Le Fanu and another v. *Malcolmson*, 1 H. L. C. 637 ; 13 L. T. (O. S.) 61 ; 8 Ir. L. R. 418.

Plaintiff had been in defendant's employment as a gardener, and was dismissed by him and entered Mr. Pierce's service. Defendant wrote to Mr. Pierce that he had dismissed plaintiff for dishonesty, adding, "I have reason to suppose that many of the flowers of which I have been robbed are growing upon your premises." An innuendo, "thereby meaning that the plaintiff was guilty of larceny, and had stolen defendant's flowers and had disposed of them unlawfully to Mr. Pierce, &c.," was held good.

Williams v. *Gardiner*, 1 M. & W. 245 ; 1 Tyr. & Gr. 578 ; 2 C. M. & R. 78.

"There is strong reason for believing that a considerable sum of money was transferred by power of attorney obtained by undue influence ;" an innuendo "meaning as a fact that the *plaintiff* had by undue influence procured the [*131] money to be transferred," was held not too wide ; for such would be the meaning conveyed to readers by the defendant's insinuations.

Turner v. *Merryweather*, 7 C. B. 251 ; 18 L. J. C. P. 155 ; 13 Jur. 683 ; 19 L. J. C. P. 10.

If asterisks be put instead of the name of the party libelled, it is sufficient that those who know the plaintiff should be able to gather from the libel that he is the person meant ; it is not necessary that all the world should understand it, so long as the meaning of the paragraph is clear to the plaintiff's acquaintances.

Bourke v. *Warren*, 2 C. & P. 307.

Some libellous verses were written about "L——y, the Bum ;" the Court was satisfied in spite of the finding of the jury that the words related to the plaintiff, a sheriff's officer.

Levi v. *Milne*, 4 Bing. 195 ; 12 Moore, 418.

"All the libellers of the kingdom know now that printing initial letters will not serve the turn, for that objection has been long got over." Per Lord Hardwicke in

Roach v. *Garvan*, *Re Read and Huggonson* (1742), 2 Atk. 470 ; 2 Dick. 794.

"His name was O'B." (meaning thereby the plaintiff). This was held sufficient in

O'Brien v. *Clement*, 16 M. & W. 159 ; 16 L. J. Ex. 77.

To say, "I have seen women steal yarn before" may amount to a charge of larceny against some particular woman now ; provided there be proper averments in the pleadings and sufficient evidence of the surrounding circumstances at the trial.

Hart v. *Coy*, 40 Ind. 553.

To say, "I believe that will to be a rank forgery" may be a slander on the solicitor who prepared it and attested the signature.

Seaman v. *Netherclift*, 1 C. P. D. 540; 45 L. J. C. P. 798; 24 W. R. 884; 34 L. T. 878.

There appeared in *Mist's Weekly Journal* an account professedly of certain intrigues, &c., at the Persian Court, really, at the English. The late King George I. was described under the name of "Merewits," George II. appeared as "Esreff," the Queen as "Sultana," while a most engaging portrait was drawn of the Pretender under the name of "Sophi." It was objected on behalf of the prisoner that there was no evidence that the author intended his seemingly harmless tale to be thus interpreted and applied: but the Court held that they must give it the same meaning as the generality of readers would undoubtedly put upon it.

R. v. *Clerk* (1729), 1 Barnard, 304.

If the defendant says "A. or B." committed such a felony, both A. and B. or either of them can sue, for both are brought into suspicion.

Anon., 1 Roll Abr. 81.

Ingalls v. *Allen*, 1 Breese, 233.

In *Falkner* v. *Cooper*, (1678), Carter, 55, the Court was divided on this point. "You or Harrison hired one Bell to forswear himself." Harrison can sue.

Harrison v. *Thornborough*, 10 Mod. 196; Gilb. Cas. in Law and Eq. 114.

If a man says "My brother," or "my enemy" is perjured, and hath only one brother or one enemy, such brother or enemy can sue; but if he says, "One of [*132] my brothers is perjured," and he hath several brothers, no one of them can sue [without special circumstances to show to which one he referred].

Jones v. *Davers*, Cro. Eliz. 497; 1 Roll. Abr. 74.

Wiseman v. *Wiseman*, Cro. Jac. 107.

But where seventeen men were indicted for conspiracy, and A. said, "These defendants are those that helped to murder Henry Farrer," each one of the defendants can bring a separate action as much as if they each had been specially named.

Foxcroft v. *Lacy*, Hobart, 89; 1 Roll. Abr. 75.

Defendant wrote and published of plaintiff, a bookseller: "The man at the sign of the Bible is no slouch at swearing to an old story." The sign over plaintiff's shop was a book, lettered "Bible," and he had recently given evidence against defendant in another action. *Held*, that he could recover.

Steele v. *Southwick*, 9 Johns. (New York) 214.

A. said to B., "One of us two is perjured," B. answered "It is not I," and A. replied, "I am sure it is not I." B. can sue A. for charging him with perjury.

Coe v. *Chambers*, 1 Roll. Abr. 75; Vin. Abr. c. b. 4.

The defendant wrote and published that his hat had been stolen by *some* of the members of No. 12 Hose Company. This hose company was a volunteer fire brigade unincorporated, and the members brought a joint action. *Held*, that the action could not be maintained, and that the defendant could not be compelled to declare to which individual members he referred.

Girard v. *Beach*, 3 E. D. Smith (New York City Common Pleas), 337.

So if a man says to a plaintiff's servant, "Thy master Brown hath robbed me," Brown can sue; for it shall not be intended that the person addressed had more than one master of the name of Brown. So if the defendant had said, "Thy master," *simpliciter;* or to a son, "Thy father;" to a wife, "Thy husband."

Per Haughton, J., in *Lewes* v. *Walter*, (1617), 3 Bulstr. 226.

Brown v. *Low* or *Lane*, Cro. Jac. 443; 1 Roll. Abr. 79.

Waldergrave v. *Agas*, Cro. Eliz. 191.

But if the defendant said to a master, "One of thy servants hath robbed me," in the absence of special circumstances no one could sue; for it is not apparent who is the person slandered.

James v. *Rutlech*, 4 Rep. 17.

So where a party in a cause said to three men who had just given evidence against him, "One of you three is perjured," no action lies.

Sir John Bourn's Case, cited Cro. Eliz. 497.

Where the defendant said to his companion B., "He that goeth before thee

is perjured," the plaintiff can sue, if he aver and prove that he was the person who was at that moment walking before B.

Aish v. *Gerish*, 1 Roll. Abr. 81.

A libel was published on a "diabolical character," who, "like Polyphemus, the man-eater, has but one eye, and is well known to all persons acquainted with the name of a certain noble circumnavigator." The plaintiff had but one eye, and his name was I'Anson; so it was clear that he was the person referred to.

I'Anson v. *Stuart*, 1 T. R. 748; 2 Smith's L. Cas. (6th ed.), 57, [omitted in 7th and 8th eds.];

Fleetwood v. *Curl*, Cro. Jac. 557; Hob. 268.

[* 133] In a recent case the libel did not name the person alluded to; but described him "as a man of high descent, who has been regarded as a man not only of refined tastes and studious habits, but as an artist of somewhat more than ordinary ability." The relator swore that he believed that the libel was intended to refer to himself. The Duke of Sutherland and others of his friends considered that it would be generally understood as applying to him; and a rule was granted. But upon the argument of the rule, the publisher and the author of the libel both swore positively that the relator was *not* the person referred to, and that they were not in fact aware that he was either a man of refined tastes and studious habits, or an artist of somewhat more than ordinary ability. And the rule was therefore discharged.

R. v. *Barnard, Ex parte Lord R. Gower*, 43 J. P. 127.

Words defamatory of A. may in some cases be also indirectly defamatory of B.

Illustrations.

Where a married man was called "cuckold" in the City of London, his wife could sue; for it was tantamount to calling her "whore."

Vicars v. *Worth*, 1 Stra. 471.

Hodgkins et ux. v. *Corbet et ux.*, 1 Stra. 545.

Slander addressed to plaintiff's wife:—"You are a nuisance to live beside of. You are a bawd; and your house is no better than a bawdy-house." *Held*, that the plaintiff could maintain the action without joining his wife, and without proving special damage; because if in fact his wife did keep a bawdy-house, the plaintiff could be indicted for it.

Huckle v. *Reynolds*, 7 C. B. N. S. 114.

Where the words *primâ facie* apply only to a *thing*, and not to a person, still if the owner of the thing can show that the words substantially reflect upon him, he may sue, without giving proof of special damage and without proving malice.

Illustrations.

To write and publish that plaintiff's ship is unseaworthy and has been sold to the Jews to carry convicts, is a libel upon the plaintiff in the way of his business, as well as upon his ship.

Ingram v. *Lawson*, 6 Bing. N. C. 212; 4 Jur. 151; 9 C. & P. 326; 8 Scott, 471.

Solomon v. *Lawson*, 8 Q. B. 823; 15 L. J. Q. B. 253; 10 Jur. 796, and other cases cited *ante*, pp. 30—32, 81.

CHAPTER IV.

[*134] SCANDALUM MAGNATUM.

By virtue of certain ancient statutes, words which would not be actionable, if spoken of an ordinary subject, are actionable, if spoken of a peer of the realm, or of a judge, or of any of the great officers of the Crown, even without proof of any special damage.

It has been maintained that this privilege existed at the common law, independently of any statute; and passages are generally cited from Reports in support of this opinion. But in the passages relied on, Lord Coke is, I think, referring to criminal, and not to civil, proceedings. And such a distinction between nobles and commoners appears to me alien to the spirit of our common law.

The following are the statutes referred to:—"Forasmuch as there have been oftentimes found in the country devisors of tales, whereby discord or occasion of discord, hath many times arisen between the King and his people or great men of this realm; for the damage that hath and may thereof ensue; it is commanded, that from henceforth none be so hardy to tell or publish any false news or tales, whereby discord, or occasion of discord or slander, may grow between the King and his people, or the great men of the realm; and he that doth so, shall be taken and kept in prison, until he hath brought him into the Court, which was the first author of the tale." (3 Edw. I. Stat. Westminster I. c. 34.)

"Item, of devisors of false news, and of horrible and [*135] false lyes, of prelates, dukes, earls, barons and other nobles and great men of the realm, and also of the chancellor, treasurer, clerk of the privy seal, steward of the King's house, justices of the one bench or the other and of other great officers of the realm, of things which by the said prelates, lords, nobles and officers aforesaid, were never spoken, done, or thought, in great slander of the said prelates, lords, nobles, and officers, whereby debates and discords might arise betwixt the said lords, or between the lords and the commons, which God forbid, and whereof great peril and mischief might come to all the realm, and quick subversion and destruction of the said realm, if due remedy be not provided: It is straitly defended upon grievous pain, for to eschew the said damages and perils, that from henceforth none be so hardy to devise, speak, or to tell any false news, lyes, or such other false things, of prelates, lords, and of other aforesaid, whereof discord or any slander might rise within the same realm; and he that doth the same shall incur and have the pain another time ordained thereof by the Statute of Westminster the First, which will, that he be taken and imprisoned till he have found him of whom the word was moved." (2 Rich. II. st. I. c. 5.)

"Item, whereas it is contained, as well in the Statute of Westminster the First, as in the statute made at Gloucester, the second year of the reign of our lord the King that now is, that none be so hardy to invent, to say, or to tell any false news, lies, or such other false things, of the prelates, dukes, earls, barons and other nobles and great men of the realm, and also of the chancellor, treasurer, clerk of the privy seal, the steward of the King's house, the justice of the one bench or of the other, and other great officers of the realm, and he that doth so shall be taken and imprisoned, till he hath found him of whom the speech shall be moved: It is accorded and agreed in this Parliament, that when any such is taken and imprisoned, and cannot find him by whom the speech be moved, as before is said, that [*136] he be punished by the advice of the counsel, notwithstanding the said statutes." (12 Rich. II. c. 11.)

Although by these statutes no *civil* remedy is expressly given, yet the violation of these provisions entitles the great men of the realm to sue for damages, on the well-known principle that if A. does an act expressly prohibited by statute, whereby B. is prejudiced, A. must compensate B. for such private injury. A. will also be liable to imprisonment for contempt on the information of the Attorney-General.

All peers, whether of Great Britain or of Scotland (5 Anne, c. 8, s. 23), are within the statute; including a viscount, though such a title of honour was unknown when the statute was passed. (*Viscount Say & Seal* v. *Stephens*, Cro. Car. 135; Ley, 82.) The king himself is within the 3 Edw. I. c. 34 (12 Rep. 133); but not within 2 Rich. II. st. 1, c. 5, not being "a great man" of his own realm. (Cromp. Author. 19, 35.) A peeress is not within either statute. (Cromp. Author. 34.) A baron of the Exchequer (and now any judge of the Supreme Court of Judicature) is within the statutes. Of course the rank or dignity which entitles the plaintiff to sue in *scandalum magnatum* must have been attained before the words complained of were published.

Although the words of the statute are "horrible and false lies," yet they have been strained to cover words which in no way affect the life or dignity of the peer, but which are merely uncivil expressions, expressing general disesteem for his lordship. For it is alleged that such expressions, though not likely to result in general discord, and the "quick subversion of the realm," yet impugn and vilify the honour of the nobles, and tend to provoke to a breach of the peace. (But see the remarks of Atkins, J., in 2 Mod. 161—165. *Lord Townshend* v. *Dr. Hughes.*) The words also were supposed to echo through the kingdom, being spoken of a peer of the realm; and the plaintiff therefore had this further privilege, that he could lay the venue where he pleased, and was not bound, like an ordinary plaintiff, to try in the county where the words were spoken.

[*137] *Illustrations.*

Words complained of:—"I value my Lord Marquess of Dorchester no more

than I value the dog at my foot." *Held*, that the action was well laid in *scandalum magnatum*, the plaintiff being a marquess. But a private person would have had no action for such words without proof of special damage, as they merely show the esteem in which the defendant held him.

Proby v. *Marquess of Dorchester* (in error), 1 Levinz, 148.
Lord Falkland v. *Phipps*, 2 Comyns, 439 ; 1 Vin. Abr. 549.

But the civil proceeding under these statutes is not quite obsolete. This may be, as alleged in Russell on Crimes (5th ed. vol. iii., p. 203, n.), because the nobility prefer "to waive their privileges in any action of slander, and to stand upon the same footing, with respect to civil remedies, as their fellow subjects." Or it may possibly be due to the decision in *Lord Peterborough* v. *Williams*, 2 Shower, 506 (or in Butt's ed. p. 650), that in *scandulum magnatum* no costs are to be given to the plaintiff, though the verdict be for him. I believe no such action has been brought since 1710. (*The Duke of Richmond* v. *Costelow*, 11 Mod. 235.

[*138] CHAPTER V.

SLANDER OF TITLE, OR WORDS CONCERNING THINGS.

Words cannot be defamatory unless they directly affect some *person;* either in his individual capacity, or in his office, profession, or trade. Sometimes no doubt an attack on a thing may be an indirect attack upon an individual; and may therefore be actionable, as defamatory of him. Thus where the defendant said of the plaintiff, "He is a cheat; he has nothing but rotten goods in his shop;" this was rightly held a slander on the plaintiff in the way of his trade (*Barnet* v. *Wells* (1700), 12 Mod. 420); for the words clearly imputed that the plaintiff was aware of the unsatisfactory condition of his wares, and yet continued to foist them on the public. So to charge a tradesman with wilfully adulterating the goods he sells is clearly an attack on *him* as well as on his goods, and would therefore be actionable without special damage. (*Jesson* v. *Hayes*, (1636), Roll. Abr. 63. See also *Ingram* v. *Lawson*, 6 Bing. N. C. 212; 8 Scott, 478, and other cases cited *ante*, pp. 30—32.

But wholly apart from these cases there is a branch of the law (generally known by the inappropriate but convenient name—Slander of Title) which permits an action to be brought against any one who maliciously decries the plaintiff's goods or some other thing belonging to him, and thereby produces special damage to the plaintiff. This is obviously no part of the law of defamation, for the plaintiff's reputation remains uninjured; it is really an action [*139] on the case for maliciously acting in such a way as to inflict loss upon the plaintiff. All the preceding rules dispensing with proof of malice and special damage are therefore wholly inapplicable to cases of this kind. Here, as in all other actions on the case, there must be *et damnum et injuria*. The *injuria* consists in the unlawful words maliciously spoken, and the *damnum* is the consequent money loss to the plaintiff.

1. *Slander of Title proper.*

Where the plaintiff possesses an estate or interest in any real or personal property, an action lies against any one who maliciously comes forward and falsely denies or impugns the plaintiff's title thereto, if thereby damage follows to the plaintiff (*Pater* v. *Baker*, 3 C. B. 869; 16 L. J. C. P. 124; 11 Jur. 370.)

The statement must be *false;* if there be such a flaw in the title as the defendant asserted, no action lies. And it is for the plaintiff to prove it false, not for the defendant to prove it true. (*Burnett* v. *Tak*, 45 L. T. 743). And the statement must be *malicious;* if it be made in the *bonâ fide* assertion of defendant's own

right, real or supposed, to the property, no action lies. But whenever a man unnecessarily intermeddles with the affairs of others with which he is wholly unconcerned, such officious interference will be deemed malicious and he will be liable, if damage follow. Lastly, *special damage* must be proved, and shown to have arisen from defendant's words. And for this it is generally necessary for the plaintiff to prove that he was in the act of selling his property either by public auction or private treaty, and that the defendant by his words prevented an intending purchaser from binding or completing. (*Tasburgh* v. *Day*, Cro. Jac. 484 ; *Lowe* v. *Harewood*, Sir W. Jones, 196 ; Cro. Car. 140.) So proof that plaintiff wished to let his lands and that the defendant prevented [*140] an intending tenant from taking a lease will be sufficient. But a mere apprehension that plaintiff's title might be drawn in question, or that the neighbours placed a lower value on plaintiff's lands in their own minds in consequence, the same not being offered for sale, will not be sufficient evidence of damage. "This action lieth not but by reason of the prejudice in the sale." (Per Fenner, J., in *Bold* v. *Bacon*, Cro. Eliz. 346.) The special damage must always be such as naturally or reasonably arises from the use of the words. (*Haddon* v. *Lott*, 15 C. B. 411 ; 24 L. J. C. P. 49; see *post*, c. X. p. 325. But see *Pawley* v. *Scratton*, 3 Times L. R. 146.)

It makes no difference whether the defendant's words be spoken or written or printed ; save as affecting the damages, which should be larger where the publication is more permanent or extensive, as by advertisement. (*Malachy* v. *Soper and another*, 3 Bing. N. C. 371 ; 3 Scott, 723.)

The property may be either real or personal ; and the plaintiff's interest therein may be either in possession or reversion. It need not be even a *vested* interest, so long as it is anything that is saleable or that has a market value.

Illustrations.

Lands were settled on D. in tail, remainder to the plaintiff in fee. D. being an old man and childless, plaintiff was about to sell his remainder to A., when the defendant interfered and asserted that D. had issue. A. consequently refused to buy. *Held*, that the action lay.

Bliss v. *Stafford*, Owen, 37 ; Moore, 188 ; Jenk. 247.

The plaintiff's father being tenant-in-tail of certain lands, which he was about to sell, the purchaser offered the plaintiff a sum of money to join in the assurance so as to estop him from attempting to set aside the deed, should he ever succeed to the estate tail ; but the defendant told the purchaser that the plaintiff was a bastard, wherefore he refused to give the plaintiff anything for his signature. *Held*, that the plaintiff had a cause of action, though he was the youngest son of his father, and his chance of succeeding was therefore remote.

Vaughan v. *Ellis*, Cro. Jac. 213.

Plaintiff succeeded to certain lands as heir-at-law ; the defendant asserted that plaintiff was a bastard ; plaintiff was in consequence put to great expense to defend his title.

Elborow v. *Allen*, Cro. Jac. 642.

To call a man a bastard while his father or other ancestor is alive may be actionable on general principles, if special damage ensue, such as the loss of a [* 141] marriage, or if he be disinherited in consequence of defendant's words (a very improbable result, as his father must know better than the defendant whether the plaintiff is a bastard or not) ; but it is not the subject of an action

for slander *of title;* for, even though heir-apparent, plaintiff has no title; but only a mere expectancy.

Nelson v. *Staff* (1618), Cro. Jac. 422.
Humphrys v. *Stanfeild, rel Stridfield* (1638), Cro. Car. 469; Godb. 451; Sir Wm. Jones, 388; 1 Roll. Abr. 38.
Turner v. *Sterling* (1671), 2 Vent. 26; *Anon.*, 1 Roll. Abr. 37.
Banister v. *Banister* (1683), 4 Rep. 17.

The defendant falsely represented to the bailiff of a manor that a sheep of the plaintiff was an estray, in consequence of which it was wrongfully seized. *Held*, that an action on the case lay against him.

Newman v. *Zachary*, Aleyn, 3.

The plaintiff was desirous to sell his lands to any one who would buy them, when the defendant said that the plaintiff had mortgaged all his lands for 100*l.*, and that he had no power to sell or let the same. No special damage being shown, judgment was stayed. It was not proved that any one intending to buy plaintiff's lands heard defendant speak the words.

Manning v. *Avery* (1674), 3 Keb. 153; 1 Vin. Abr. 553.

The plaintiff was possessed of tithes which he desired to sell; the defendant falsely and maliciously said, "His right and title thereunto is nought, and I have a better title than he." As special damage it was alleged that the plaintiff "was likely to sell, and was injured by the words; and that by reason of the defendant's speaking the words, the plaintiff could not recover his tithes." *Held*, insufficient.

Cane v. *Golding* (1649), Style, 169, 176.
Law v. *Harwood* (1629), Sir Wm. Jones, 196; Palm. 529; Cro. Car. 140.

The plaintiff was the assignee of a beneficial lease, which he expected would realize 400*l.* But the defendant, the superior landlord, came to the sale, and stated publicly, "The whole of the covenants of this lease are broken, and I have served notice of ejectment; the premises will cost £70 to put them in repair." In consequence of this statement the property fetched only 35 guineas. Rolfe, B., left to the jury only one question—Was the defendant's statement true or false? and they found a verdict for the plaintiff; damages, £40. But the Court of Exchequer granted a new trial on the ground that two other questions ought to have been left to the jury as well:—Was the statement or any part of it made maliciously? and, Did the special damage arise from such malicious statement or from such part of it as was malicious?

Brook v. *Rawl*, 4 Exch. 521; 19 L. J. Ex. 114.
And see *Smith* v. *Spooner*, 3 Taunt. 246.
Milman v. *Pratt*, 2 B. & C. 486; 3 D. & R. 728.
Watson v. *Reynolds*, Moo. & Mal. 1.

An advertisement was sent to the *Wolverhampton Chronicle* in the ordinary course of business and published once on January 6th, 1868. It was as follows:—"Important notice. Horsehill Estate. The public are respectfully requested not to buy any property formerly belonging to A., B., and C., without ascertaining that the title deeds of the same are correct; as the heirs are not dead nor abroad, but are still alive." This estate was at that moment adver- [*142] tised for sale in building lots; but this advertisement revived all previous doubts about plaintiff's title, and rendered the estate practically unsaleable. On January 13th plaintiff wrote and complained of this advertisement, and asked for the name and address of the person who sent it to the paper. This the proprietor of the paper at once furnished; but on January 30th he was served with a writ. On February 10th he inserted an apology. But the jury, under the direction of Keating, J., found for the plaintiff.

Ravenhill v. *Upcott*, 33 J. P. 299.

The plaintiff held 160 shares in a silver mine in Cornwall, which he said were worth £100,000. Tollervey and Hayward each filed a bill in Chancery against the plaintiff and others claiming certain shares in the mine, and praying for an account and an injunction, and for the appointment of a receiver. To these bills plaintiff demurred. Before the demurrers came on for hearing, a paragraph appeared in the defendants' newspaper to the effect that the demurrers had been overruled, that an injunction had been granted, that a receiver had

been duly appointed, and had actually arrived at the mine; all of which was quite untrue. A verdict having been obtained for the plaintiff, damages £5, the Court of Common Pleas arrested judgment on the ground that there was no sufficient allegation of special damage, and this, although the declaration contained averments to the effect that "the plaintiff is injured in his rights; and the shares so possessed by him, and in which he is interested, have been and are much depreciated and lessened in value; and divers persons have believed and do believe that he has little or no right to the shares, and that the mine cannot be lawfully worked or used for his benefit; and that he hath been hindered and prevented from selling or disposing of his said shares in the said mine, and from working and using the same in so ample and beneficial a manner as he otherwise would have done."

Malachy v. *Soper and another*, 3 Bing. N. C. 371; 3 Scott, 723; 2 Hodges, 217.

And see *Hart and another*, v. *Wall*, 2 C. P. D. 146; 46 L. J. C. P. 227; 25 W. R. 373, *ante*, p. 32.

It is not actionable for any man to assert his own rights at any time. And even where the defendant fails to prove such right on investigation, still if at the time he spoke he *bonâ fide* supposed such right to exist, no action lies. (*Carr* v. *Duckett*, 5 H. & N. 783; 29 L. J. Ex. 468.) Hence, whenever a man claims a right or title in himself, in possession or in remainder, it is not enough for the plaintiff to prove that he had no such right; he must also give evidence of express malice (*Smith* v. *Spooner*, 3 Taunt. 246); that is, he must also attempt to show that the defendant could not honestly have believed in the existence of the right he claimed, or at least that he had no reason-[*143] able or probable cause for so believing. If there appear no reasonable or probable cause for his claim of title, still the jury are not bound to find malice; the defendant may have acted stupidly, yet from an innocent motive. (*Pitt* v. *Donovan*, 1 M. & S. 648; *Steward* v. *Young*, L. R. 5 C. P. 122; 39 L. J. C. P. 85; 18 W. R. 492; 22 L. T. 168; *Clark* v. *Molyneux*, 3 Q. B. D. 237; 47 L. J. Q. B. 230; 26 W. R. 104; 37 L. T. 694.) But in all cases where it appears that the defendant at the time he spoke knew that what he said was false, the jury should certainly find malice; lies which injure another cannot be told *bonâ fide*. (*Waterer* v. *Freeman*, Hob. 266.)

The law is the same where the defendant is an agent or attorney, and claims for his principal or client a title which he honestly believes him to possess. (*Hargrave* v. *Le Breton*, 4 Burr. 2422; *Steward* v. *Young*, L. R. 4 C. P. 122; 39 L. J. C. P. 85; 18 W. R. 492; 22 L. T. 186.) So where a man *bonâ fide* asserts a title in his father or other near relative to whom he or his wife is heir apparent. (*Pitt* v. *Donovan*, 1 M. & S. 639; *Gutsole* v. *Mathers*, 1 M. & W. 499; 5 Dowl. 69; 2 Gale, 64; 1 Tyrw. & Gr. 694.) But where the defendant makes no claim at all for himself or any connection of his, but asserts a title in some one who is a stranger to him, here he clearly is meddling in a matter which does not concern him; and such officious and unnecessary interference will be deemed malicious. (*Penmyman* v. *Rabanks*, Cro. Eliz. 427; 1 Vin. Abr. 551; *Mildmay et ux.* v. *Standish*, 1 Rep. 177 b; Cro. Eliz. 34; Moore, 144; Jenkins's Centuries, 247.)

"If some portions of the statement which a person makes are *bonâ fide*, but others are *malâ fide*, and occasion injury to another, the injured party cannot recover damages unless he can distinctly trace the damage as resulting from that part which is made *malâ fide*." (Per Parke, B., in *Brook* v. *Rawl*, 4 Ex. 524.) So if part be true and part false. (*Ib.* 523.)

Illustrations.

[*144] Plaintiff had purchased the manor and castle of H. in fee from Lord Audley, and was about to demise them to Ralph Egerton for a term of twenty-two years, when the defendant, a widow, said, "I have a lease of the castle and manor of H. for ninety years;" and she showed him what purported to be a lease from a former Lord Audley to her husband for a term of ninety years. This lease was a forgery; and the defendant knew it. *Held*, that an action lay for slander of title; though the defendant had claimed a right to the property herself. It would have been otherwise had she not known that the lease was a forgery.

Sir. G. Gerard v. *Dickenson*, 4 Rep. 18; Cro. Eliz. 197.
And see Fitzh. Nat. Brev. 116 (B. & D.)
Lovett v. *Weller*, 1 Roll. R. 409.

If the defendant asserts that plaintiff is a bastard, and that he himself is the next heir, no action lies.

Banister v. *Banister* (1683), 4 Rep. 17.
Cane v. *Golding* (1649), Styles, 169, 176.

The plaintiff put up for sale by public auction eight unfinished houses in Agar Town. The defendant, a surveyor of roads appointed under the 7 & 8 Vict. c. 84, had previously insisted that these houses were not being built by the plaintiff in conformity with the Act. He now attended the sale and stated publicly, "My object in attending the sale is to inform purchasers, if there are any present, that I shall not allow the houses to be finished until the roads are made good. I have no power to compel the purchasers to complete the roads; but I have power to prevent them from completing the houses until the roads are made good." In consequence only two of the carcasses were sold; and they realized only £35 each, instead of £65. The jury found a verdict for the plaintiff for £18 12*s*. But the Court of Common Pleas held that there was no evidence of malice to go to the jury. For malice is not to be inferred from the circumstance of the defendant having acted upon an incorrect view of his duty, founded upon an erroneous construction of the statute.

Puter v. *Baker*, 3 C. B. 831; 16 L. J. C. P. 124; 11 Jur. 370.
Hargrave v. *Le Breton*, 4 Burr. 2422.

Plaintiff held lands on lease from Home, which he put up for sale. Defendant, who was Home's attorney, attended and said publicly before the first lot was put up, "There is a suit depending in the Court of Chancery in respect to this property; encroachments have been made; proceedings will be taken against the purchaser; there is no power to sell the premises; a good title cannot be made," &c. Littledale, J., directed the jury that defendant was not liable, if he *bonâ fide*, though without authority, raised such objections only as Home, if present, might lawfully have raised. Verdict for the plaintiff. Damages, one farthing.

Watson v. *Reynolds*, Moo. & Mal. 1.
Pawley v. *Scratton*, 3 Times L. R. 146.

The plaintiff was the widow and administratrix of her deceased husband, and advertised a sale of some of his property. Defendant, an old friend of the husband, thereupon put an advertisement in the papers offering a reward for the production of the will of the deceased. The defendant subsequently called on the solicitor of the deceased, and was assured by him there was no will; but, in spite of this, the defendant attended at the sale and make statements which [*145] effectually prevented any person present from bidding. After waiting twelve months, the plaintiff again put the same property up for sale, and defendant again stopped the auction. Cockburn, C. J., left it to the

jury to say whether, after the interview with the plaintiff's solicitor, defendant could still possess an honest and reasonable belief that the deceased had left a will. The jury found that he had not that belief. Verdict for the plaintiff. Damages, £54 7*s*.

Atkins v. *Perrin*, 3 F. & F. 179.

A. died possessed of furniture in a beer-shop. His widow, without taking out administration, continued in possession of the beer-shop for three or four years, and then died, having whilst so in possession conveyed all the furniture by bill of sale to her landlords by way of security for a debt she had contracted with them. After the widow's death, the plaintiff took out letters of administration to the estate of A., and informed the defendant, the landlord's agent, that the bill of sale was invalid, as the widow had no title to the furniture. Subsequently the plaintiff was about to sell the furniture by auction, when the defendant interposed to forbid the sale, and said that he claimed the goods for his principals under a bill of sale. On proof of these facts, in an action for slander of title, the plaintiff was nonsuited. *Held*, that the mere fact of the defendant's having been told before the sale that the bill of sale was invalid, was no evidence of malice to be left to the jury, and that the plaintiff was therefore properly nonsuited.

Steward v. *Young*, L. R. 5 C. P. 122; 39 L. J. C. P. 85; 18 W. R. 492; 22 L. T. 168.

And see *Blackham* v. *Pugh*, 2 C. B. 611; 15 L. J. C. P. 290.

The defendant wrongfully and maliciously caused certain persons who had agreed to sell goods to the plaintiff to refuse to deliver them, by asserting that he had a lien upon them, and ordering those persons to retain the goods until further orders from him, he well knowing at the time that he had no lien. *Held*, that the action was maintainable, though the persons who had the goods were under no legal obligation to obey the orders of the defendant, and their refusal was their own spontaneous act.

Green v. *Button*, 2 C. M. & R. 707.

Barley v. *Walford*, 9 Q. B. 197; 15 L. J. Q. B. 369; 10 Jur. 917.

The lessee of an hotel agreed to sell her lease and certain valuable tenant's fixtures to Turner. Defendant, the assignee of the lessor, thereupon gave notice to Turner that he claimed most of the fixtures as landlord's fixtures, and that if Turner bought them, he would have to give them up at the end of the term or pay defendant for them. *Held*, that no action lay, for there was no evidence of malice, although defendant had no present property in the goods.

Baker and others v. *Piper*, 2 Times L. R. 733.

Patents, &c.

The defendant had a subsisting patent for the manufacture of spooling machines; so had the plaintiff. The defendant wrote to certain manufacturers, customers of the plaintiff, warning them against using the plaintiff's machine, on the ground that it was an infringement of the defendant's patent. *Held*, that "the action could not lie unless the plaintiff affirmatively proved that the defendant's claim was not a *bonâ fide* claim in support of a right which, with or without cause, he fancied he had, but a *malâ fide* and malicious attempt to injure the plaintiff by asserting a claim of right against his own knowledge [*146] that it was without any foundation." Evidence to show that the defendant's patent, though subsisting, was void for want of novelty, was not admitted, as being irrelevant in this action.

Wren v. *Weild*, L. R. 4 Q. B. 730, 737; 10 B. & S. 51; 38 L. J. Q. B. 88, 327; 20 L. T. 277.

And see *Dicks* v. *Brooks*, 15 Ch. D. 22; 49 L. J. Ch. 812; 29 W. R. 87; 40 L. T. 710; 43 L. T. 71.

Hammersmith Skating Rink Co. v. *Dublin Skating Rink Co.*, 10 Ir. R. Eq. 235.

But a patentee is not entitled to publish statements that he intends to institute legal proceedings in order to deter persons from purchasing alleged infringements of his patent, unless he does honestly intend to follow up such threats by really taking such proceedings.

Rollins v. *Hinks*, L. R. 13 Eq. 355; 41 L. J. Ch. 358; 20 W. R. 287; 26 L. T. 56.

Axmann v. *Lund*, L. R. 18 Eq. 330; 43 L. J. Ch. 655; 22 W. R. 789.

Watson v. *Trask*, 6 Ohio, 531.

The holder of a patent, the validity of which is not impeached, who issues notices to the trade, alleging that certain articles are infringements of his patent, and threatening legal proceedings against those who purchase them, is not liable to an action for damages by the vendor of those articles for the injury done to the vendor's trade thereby, provided such notices are issued *bonâ fide* in the belief that the articles complained of are infringements of the patent. Nor is he liable to be restrained by injunction from continuing to issue them until it is proved that they are untrue, so that his further issuing them would not be *bonâ fide*.

Halsey v. *Brotherhood* (C. A.), 19 Ch. D. 386; 51 L. J. Ch. 233; 30 W. R. 279; 45 L. T. 640; affirming the decision of Jessel, M. R., 15 Ch. D. 514; 49 L. J. Ch. 786; 29 W. R. 9; 43 L. T. 366.

To restrain the defendant from issuing circulars, &c., stating the wrongful user by the plaintiff upon his manufactured articles of labels claimed by the defendant, and from threatening the plaintiff's customers with legal proceedings for selling articles bearing those labels, the plaintiff must satisfy the Court that the statements complained of are untrue.

Anderson v. *Liebig's Extract of Meat Co.*, 45 L. T. 757.

And see *Fyfe* v. *Gray*, 73 L. T. (Newspaper) 309.

Where defendant has issued notices to plaintiff's customers asserting that plaintiff in selling certain goods is infringing defendant's patent rights, it is for the plaintiff to prove that the defendant's statements are false, and if no *malâ fides* is proved, so that no damages could be recovered, the Court will not grant an injunction. If in a judicial proceeding the statements are proved to be false in fact, an injunction will be granted against continuing them, as that would be acting *malâ fide*.

Burnett v. *Tak*, 45 L. T. 743.

In fact a very strong *primâ facie* case must be shown by the plaintiff for the Court to restrain the *bonâ fide* issue of circulars, warning persons that if they buy of the plaintiff they will infringe the defendant's patent and be liable to proceedings.

Société Anonyme des Manufactures de Glaces v. *Tilghman's Patent Sand Blast Co.* (C. A.). 25 Ch. D. 1; 53 L. J. Ch. 1; 32 W. R. 71; 49 L. T 451.

[*147] The plaintiffs were the makers of "Rainbow Water Raisers or Elevators," and they commenced an action for an injunction to restrain the defendants from issuing a circular cautioning the public against the use of such elevators as being direct infringements of certain patents of the defendants'. The plaintiffs subsequently gave notice of a motion to restrain the issue of this circular until the trial of the action. The defendants then commenced a cross action, claiming an injunction to restrain the plaintiffs from infringing their patents. *Held*, by Kay, J., that as there was no evidence of *malâ fides* on the part of the defendants, they ought not to be restrained from issuing the circular until their action had been disposed of, but that they must undertake to prosecute their action without delay.

Household and another v *Fairburn and another*, 51 L. T. 498.

And now see 46 and 47 Vict. c. 57, s. 32.

Barney v. *United Telephone Co.*, 28 Ch. D. 394; 33 W. R. 576; 52 L. T. 573.

Driffield Cake Co. v. *Waterloo Cake Co.*, 31 Ch. D. 638; 55 L. J. Ch. 391; 34 W. R. 360; 54 L. T. 210.

Walker v. *Clarke*, 56 L. T. 111; 3 Times L. R. 297.

II. *Slander of Goods manufactured or sold by another.*

"An untrue statement, disparaging a man's goods, published without lawful occasion, and causing him special damage, is action-

able." This is laid down as a general principle by Bramwell, B., in *Western Counties Manure Co.* v. *Lawes Chemical Manure Co.*, L. R. 9 Ex. 218, 222 ; 43 L. J. Ex. 171 ; 23 W. R. 5 ; and it applies although no imputation is cast on the plaintiff's private or professional character. Nor, in the opinion of the same learned judge, is it necessary to prove actual malice ; it is sufficient if it be made "without reasonable cause."

At the same time it is not actionable for a man to commend his own goods, or to advertise that he can make as good articles as any other person in the trade. (*Harman* v. *Delaney*, 2 Str. 898 ; 1 Barnard. 289 ; Fitz. 121.) Competition between rival traders is allowed to any extent, so long as only lawful means are resorted to. (*Pudsey Coal Gas Co.* v. *Corporation of Bradford*, L. R. 15 Eq. 167 ; 42 L. J. Ch. 293 ; 21 W. R. 286 ; 28 L. T. 11 ; *Mogul Steamship Co.* v. *M'Gregor, Gow & Co.*, 15 Q. B. D. 476 ; 54 L. J. Q. B. 540 ; 53 L. T. 268 ; 49 J. P. 646.) But force and violence must not be used (*Young* v. *Hickens*, [*148] 6 Q. B. 606), nor threats (*Tarleton and others* v. *McGawley*, Peake, 204, 270), nor imputations of fraud or dishonesty.

In *Evans* v. *Harlow* (1844), 5 Q. B. 624 ; 13 L. J. Q. B. 120 ; Dav. & M. 507, which appears to be the earliest case of this kind, no special damage was alleged ; and the only point decided was that the words were not a libel on the plaintiff in the way of his trade, and that therefore no action lay. The court did not expressly decide that had special damage been alleged, the declaration would have been good, though Patteson, J., was clearly of that opinion, as appears from his remarks on p. 633. These remarks were cited to the Court in the next case of the kind, *Young* v. *Macrae*, 3 B. & S. 264 ; 32 L. J. Q. B. 6 ; 11 W. R. 63 ; 9 Jur. N. S. 539 ; 7 L. T. 354. But there the libel did not impute that the plaintiff's oil was bad in itself, but merely alleged that it was inferior to that of the defendant ; and, again, it was held that no action lay. Blackburn, J., asks (3 B. & S. 269) : "Is there any case where an action has been maintained for slander, written or verbal, of *goods*, unless where the slander is of the *title* to them, and special damage has resulted ?" But the *dicta* of the other judges fully bear out the head-note : "*Semble*, that if a person falsely and maliciously disparages an article which another manufactures or vends, and special damage results therefrom, an action will lie, although in so doing no imputation was cast on the personal or professional character of the manufacturer or vendor." And this *semble* may now, I think, be considered as settled law since the decision in *Western Counties Manure Co.* v. *Lawes Chemical Manure Co.*, *supra*.

It is unfortunate that in the report of *Young* v. *Macrae*, in the Law Journal (32 Q. B. p. 8), Cockburn, C. J., is represented as stating : "I am very far from saying that if a trader maliciously, and falsely *to his own knowledge*, publishes matter disparaging an article manufactured, or sold by another, even if he makes no reflection upon the character, trade, or profession of that other, and if special damage

followed, that there would not be an actionable libel ; for a most grievous wrong might be done in that way, and the person injured ought to have a remedy by an action." The words "falsely to his own knowledge," seem to imply that fraud or misrepresentation is essential to the cause of action ; and it is on the authority of this passage, no doubt, that I find it stated in Addison on Torts (3rd ed. p. 787 ; 4th ed. p. 796 ; 5th ed. p. 184) : "Disparaging criticisms by one tradesman upon the goods of a rival tradesman are not [*149] actionable, unless it is proved that they have been *maliciously and fraudulently made, and were false to the knowledge of the party at the time they were made.*" But in no other place in the Law Journal Report is there any hint that a *scienter* must be proved, although the Lord Chief Justice gives several instances during the argument, and later in his judgment, in which, in his opinion, an action would lie. That the statement was false to the knowledge of the defendant is cogent evidence of malice ; but surely any other evidence of malice would be sufficient. In Best & Smith the passage cited above is given as follows: "I am far from saying that if a man falsely and maliciously makes a statement disparaging an article which another manufactures or vends, although in so doing he casts no imputation on his personal or professional character, and thereby causes an injury, and special damage is averred, an action might not be maintained. For although none of us are familiar with such actions, still we can see that a most grievous wrong might be done in that way, and it ought not to be without remedy." (3 B. & S. 269.) And so in the Law Times Reports (7 L. T. 355), the words are merely "falsely and maliciously ;" in the Jurist (9 Jur. N. S. 539), merely "a disparaging notice ;" though the Weekly Reporter (11 W. R. 63) contains, in addition to "falsely and maliciously," the words "by statements he knows to be false." In *Western Counties Manure Co.* v. *Lawes Manure Co.*, the declaration before the Court did not contain any averment "as the defendants well knew." (See the whole pleadings in Appendix A.) I conclude, therefore, that the defendant's knowledge of the falsity of his statements at the time he makes them is immaterial in this action, save as aggravating the damages.

In *Thomas* v. *Williams*, 14 Ch. D. 864 ; 49 L. J. Ch. 605 ; 28 W. R. 983 ; 43 L. T. 91, Fry, J., decided that to entitle a plaintiff to an injunction to restrain a libel injurious to trade, it was not necessary that he should prove actual damage. But see *Dicks* v. *Brooks* (C. A.), 15 Ch. D. 22 ; 49 L. J. Ch. 812 ; 29 W. R. 87 ; 40 L. T. 710 ; 43 L. T. 71.

Illustrations.

The defendant published an advertisement, denying that the plaintiff held any patent for the manufacture of "self-acting tallow syphons or lubricators," and cautioning the public against such lubricators as wasting the tallow. No special damage was alleged. *Held*, that the words were not a libel on the plaintiff either generally, or in the way of his trade, but were only a reflection upon the goods sold by him, which was not actionable without special damage.

Evans v. *Harlow*, 5 Q. B. 624 ; 13 L. J. Q. B. 120 ; Dav. & M. 507 ; 8 Jur. 571; *ante*, p. 31.

"If a man makes a false statement with respect to the goods of A., in com-
[*150] paring his own goods with those of A., and A. suffers special damage, will not an action lie?" Per Cockburn, C. J., in

Young and others v. *Macrae*, 32 L. J. Q. B. 8;

and counsel answers, "Certainly it would."

"If a man were to write falsely that what another man sold as Turkish rhubarb was three parts brickdust, and special damage could be proved, it might be actionable." Per Cockburn, C. J., in

Young and others v. *Macrae*, 32 L. J. Q. B. 7.

The defendant published a certificate by a Dr. Muspratt, who had compared the plaintiffs' oil with the defendant's, and deemed it inferior to the defendant's. It was alleged that the certificate was false, and that divers customers of the plaintiffs after reading it had ceased to deal with the plaintiffs and gone over to the defendant. *Held*, that the plaintiffs' oil, even if inferior to the defendant's, might still be very good; and that the falsity was alleged too generally, and that therefore no action lay. It was consistent with the declaration that every word said about the plaintiffs' oil should be true, and the only falsehood the assertion that defendant's was superior to it, which would not be actionable. "It is not averred that the defendant falsely represented that the oil of the plaintiffs had a reddish-brown tinge, was much thicker, and that it had a more disagreeable odour. If that had been falsely represented, and special damage had ensued, an action might have been maintained."

Young and others v. *Macrae*, 3 B. & S. 264; 32 L. J. Q. B. 6; 11 W. R. 63; 9 Jur. N. S. 539; 7 L. T. 354.

The defendants falsely and without lawful occasion published a detailed analysis of the plaintiffs' artificial manure and of their own, in which the plaintiffs' manure was much disparaged and their own extolled. Special damage having resulted, *held* that the action lay.

Western Counties Manure Co. v. *Lawes Chemical Manure Co.*, L. R. 9 Ex. 218; 43 L. J. Ex. 171; 23 W. R. 5.

See *Thorley's Cattle Food Co.* v. *Massam*, 6 Ch. D. 582; 46 L. J. Ch. 713; 14 Ch. D. 763; 28 W. R. 295, 966; 41 L. T. 542; 42 L. T. 851.

Salmon v. *Isaac*, 20 L. T. 885.

The defendant stated in Ireland that the plaintiff's ship was unseaworthy, consequently her crew refused to proceed to sea in her, and a negotiation for the sale of her fell through. The ship was in England. But it was held that this fact would not give an English Court jurisdiction.

Casey v. *Arnott*, 2 C. P. D. 24; 46 L. J. C. P. 3; 25 W. R. 46; 35 L. T. 424.

There are many other cases in which words produce special damage to the plaintiff without in any way affecting his reputation; and for such words, if spoken without lawful occasion, an action on the case will lie, provided the damage be the necessary or probable consequence of the words. (See *ante*, p. 15.) But such cases are outside the scope of this book.

CHAPTER VI.

PUBLICATION. [*151]

PUBLICATION is the communication of the defamatory words to some third person or persons. It is essential to the plaintiff's case that the defendant's words should be *expressed;* the law permits us to think as badly as we please of our neighbours so long as we keep our uncharitable thoughts to ourselves. Merely composing a libel is not actionable unless it be published. And it is no publication when the words are only communicated to the person defamed; for that cannot injure his reputation. A man's reputation is the estimate in which others hold him; not the good opinion which he has of himself. And the communication, whether it be in words, or by signs, gestures, or caricature, must be *intelligible* to such third person. If the words used be in the vernacular of the place of publication, it will be presumed that such third person understood them, until the contrary be proved. And it will be presumed that he understood them in the sense which such words properly bear in their ordinary signification, unless some reason appear for assigning them a different meaning.

The *onus* lies on the plaintiff to prove publication; and such publication must of course be prior to the date of the writ.

Illustrations.

To shout defamatory words on a desert moor where no one can hear you is not a publication; but if anyone chances to hear you, it is a publication, although you thought no one was by.

[*152] To utter defamatory words in a foreign language is not a publication, if no one present understands their meaning; but if defamatory words be written in a foreign language, there will be a publication as, soon as ever the writing comes into the hands of anyone who does understand that language, or who gets them explained or translated to him.

If defamatory words be spoken in English when the only person present besides the plaintiff is a German who does not understand English, this is no publication.

Hurtert v. *Weines*, 27 Iowa, 134.

Sending a letter through the post to the plaintiff, properly addressed to him, and fastened in the usual way, is no publication; and the defendant is not answerable for anything the plaintiff may choose to do with the letter after it has once safely reached his hands.

Barrow v. *Lewellin*, Hob. 62.

In an American case the plaintiff, after so receiving a libellous letter from the defendant, sent for a friend of his and also for the defendant; he then repeated the contents of the letter in their presence, and asked the defendant if he wrote that letter; the defendant, in the presence of the plaintiff's friend, admitted that he had written it. *Held*, no publication *by the defendant* to the plaintiff's friend.

Fonville v. *Nease*, Dudley, S. C. 303.

But it is otherwise if a message be sent to the plaintiff by telegraph; the

contents of the telegram are necessarily communicated to all the clerks through whose hands it passes. So with a postcard.

Whitfield and others v. *S. E. Ry. Co.*, E. B. & E. 115 ; 27 L. J. Q. B. 229 ; 4 Jur. N. S. 688.

Williamson v. *Freer*, L. R. 9 C. P. 393 ; 43 L. J. C. P. 161 ; 22 W. R. 878 ; 30 L. T. 332.

Robinson v. *Jones*, 4 L. R. Ir. 391.

So where the defendant knew that the plaintiff's letters were always opened by his clerk in the morning, and yet sent a libellous letter addressed to the plaintiff, which was opened and read by the plaintiff's clerk lawfully and in the usual course of business, *held* a publication by the defendant to the plaintiff's clerk.

Delacroix v. *Thevenot*, 2 Stark. 63.

So where the defendant, before posting the letter to the plaintiff, had it copied. *Held*, a publication by the defendant to his own clerk who copied it.

Keene v. *Ruff*, 1 Clarke (Iowa), 482.

So where the defendant wrote a letter to the plaintiff himself, but read it to a friend before posting it.

Snyder v. *Andrews*, 6 Barbour (New York), 43.

McCombs v. *Tuttle*, 5 Blackford (Indiana), 431.

The delivery of a newspaper containing a libel to the proper officer of the Commissioners of Stamps and Taxes for revenue purposes was a sufficient publication of the libel ; although the proprietor of the paper was required by law so to deliver it.

R. v. *Amphlit*, 4. B. & C. 35 ; 6 D. & R. 125.

So the delivery of a manuscript to be printed is a sufficient publication ; even [*153] though the author repent and suppress all the printed copies. For the compositor must hear it read.

Baldwin v. *Elphinston*, 2 W. Bl. 1037.

This may be considered a somewhat harsh decision, as the compositor does not attend to the substance of the manuscript, but sets it up in type mechanically ; but it has recently been acted on in America.

Trumbull v. *Gibbons*, 3 City Hall Recorder, 97.

And see *Watts* v. *Fraser and another*, 7 Ad. & E. 223; 6 L. J. K. B. 226 ; 7 C. & P. 369 ; 1 M. & Rob. 449 ; 2 N. & P. 157 ; 1 Jur. 671 ; W. W. & D. 451.

At all events where it is proper that the words should be printed, the publication, if it be one, to the printer and his men will not destroy any privilege which might otherwise exist.

Lawless v. *The Anglo-Egyptian Cotton and Oil Co.*, L. R. 4 Q. B. 262 ; 10 B. & S. 226 ; 38 L. J. Q. B. 129 ; 17 W. R. 498.

Lake v. *King*, 1 Lev. 241 ; 1 Saund. 131 ; Sid. 414 ; 1 Mod. 58.

But merely to be in possession of a copy of a libel is no crime, unless some publication thereof ensue.

R. v. *Beere*, Carth. 409 ; 12 Mod. 219 ; Holt, 422 ; 2 Salk. 417, 646; 1 Ld. Raym. 414.

And see 11 Hargrave's St. Tr. 322, sub *Entick* v. *Carrington*.

Although husband and wife are generally to be considered one person in actions of tort as well as of contract (*Phillips* v. *Barnet*, 1 Q. B. D. 436), still the plaintiff's wife is sufficiently a third person to make a communication to her of words defamatory of her husband a publication in law. (*Wenman* v. *Ash*, 13 C. B. 836 ; 22 L. J. C. P. 190 ; 1 C. L. R. 592; 17 Jurist, 579; *Jones* v. *Williams*, 1 Times L. R. 572.) And it is submitted that similarly a communication to the husband of a charge against his wife is a sufficient publication. The doubt suggested by Jervis, C. J., in *Wenman* v. *Ash* must mean that he considered a communication to the husband of a report prejudicial to his wife was *primâ facie* privileged as being a friendly act ; not that it was no publication. To communicate to

a wife a charge or complaint against her husband is not a friendly act, and is not privileged. (*Jones* v. *Williams*, *supra*.)

The converse case of the defendant and his wife seems never to have been decided. Is it a publication if a man tells his wife what he thinks of his neighbours? I presume it is, though the question seems never to have arisen in England; probably because in every such case there has been an almost immediate republication of the same slander (or an exaggerated version of it) by the wife to some third person; for which the husband would be equally answerable in damages, and which would be easier to prove. In America there is a *dictum* that the delivery of a libel by the author to his wife "in [*154] confidence" is privileged. (*Trumbull* v. *Gibbons*, 3 City Hall Recorder, 97.) And in England it was decided in *Jones* v. *Thomas*, 34 W. R. 104; 53 L. T. 678; 50 J. P. 149, that the fact that defendant's wife was present on a privileged occasion, and heard what her husband said, would not take away the privilege, so long as her presence, though unnecessary, was not improper.

The plaintiff must prove a publication by the defendant *in fact*. A libel is deemed to be published as soon as the manuscript has passed out of defendant's possession (per Holroyd, J., in *R.* v. *Burdett*, 4 B. & Ald. 143), unless it comes directly and unread into the possession and control of the plaintiff. That some third person had the opportunity of reading it in the interval is not sufficient, if the jury are satisfied that he did not in fact avail himself thereof; even though it is clear that the defendant desired and intended publication to such third person.

Illustrations.

A letter is published as soon as posted, and in the place where it is posted, if it is ever opened anywhere by any third person.

Ward v. *Smith*, 6 Bing, 749; 4 M. & P. 595; 4 C. & P. 302.
Clegg v. *Laffer*, 3 Moore & Scott, 727; 10 Bing. 250.
Warren v. *Warren*, 4 Tyr. 850; 1 C. M. & R. 250.
Shipley v. *Todhunter*, 7 C. & P. 680.

The defendant wrote a letter and gave it to B. to deliver to the plaintiff. It was folded, but not sealed. B. did not read it; but conveyed it direct to the plaintiff. *Held*, no publication.

Clutterbuck v. *Chaffers*, 1 Stark. 471.
Day v. *Bream*, 2 Moo. & Rob. 54.

The defendant threw a sealed letter addressed to the plaintiff, "or C.," into M.'s enclosure. M. picked it up and delivered it unopened to the plaintiff himsel, who alone was libelled. No publication.

Fonville v. *Nease*, Dudley, S. C. 303 (American).

By the 38 Geo. III. c 71, s. 17 (now repealed), the proprietor of every newspaper was required to send a copy of every issue to the Stamp Office for Revenue purposes. *Held*, that proof of the delivery of a newspaper to the officer at the Stamp Office was sufficient evidence of the publication of a libel contained in it to render the proprietor liable to an action; "as the officer of the Stamp Office would at all events have an opportunity of reading the libel himself."

R. v. *Amphlit*, 4 B. & C. 35; 6 D. & R. 125.
Mayne v. *Fletcher*, 9 B. & C. 382; 4. Man. & Ry. 312.

[*155] Posting up a libellous placard and taking it down again before anyone could read it is no publication; but if it was exhibited long enough for anyone

to read it, then defendant must satisfy the jury that no one actually did read it.

So it is no defence that the third person was not intended to overhear the slander or to read the libel, if in fact he has done so. An accidental or inadvertent communication is quite sufficient. (See *Shepheard* v. *Whitaker*, L. R. 10 C. P. 502 ; 32 L. T. 402 ; c. I. *ante*, p. 6.)

Illustrations.

The defendant by mistake directed and posted a libellous letter to the plaintiff's employer instead of to the plaintiff himself. *Held*, a publication.

Fox v. *Broderick*, 14 Ir. C. L. Rep. 453.

And see *Tompson* v. *Dashwood*, 11 Q. B. D. 43 ; 52 L. J. Q. B. 425 ; 48 L. T. 943 ; 48 J. P. 55.

Rev. Samuel Paine sent his servant to his study for a certain paper which he wished to show to Brereton ; the servant by mistake brought a libellous epitaph on Queen Mary, which Paine inadvertently handed to Brereton, supposing it to be the paper for which he sent ; and Brereton read it aloud to Dr. Hoyle. This would probably be deemed a publication by Paine to Brereton in a civil case. (Note to *Mayne* v. *Fletcher*, 4 Man. & Ry. 312) ; but would not be sufficient in a criminal case.

R v. *Paine* (1695), 5 Mod. 167.

For in a criminal case it is essential that there should be a guilty intention.

R. v. *Lord Abingdon*, 1 Esp. 228.

See also *Brett* v. *Watson*, 20 W. R. 723.

Blake v. *Stevens*, 4 F. & F. 232 ; 11 L. T. 542.

But if I compose or copy a libel, and keep the manuscript in my study, intending to show it to no one, and it is *stolen* by a burglar and published by him ; it is submitted that there is no publication by me, either in civil or criminal proceedings.

See *Weir* v. *Hoss*, 6 Alabama, 881.

But it would be a publication by me, if through any default of mine it got abroad.

Every one who requests, procures, or commands another to publish a libel is answerable as though he published it himself. And such request need not be express, but may be inferred from the defendant's conduct in sending his manuscript to the editor of a magazine, or making a statement to the reporter of a newspaper, with the knowledge that they will be sure to publish it, and without any effort [* 156] to restrain their so doing. And it is not necessary that the defendant's communication be inserted *verbatim*, so long as the sense and substance of it appear in print.

This rule is of great value in cases where the words employed are not actionable when spoken ; but are so if written. Here, though the proprieter of the newspaper is of course liable for printing them, still it is more satisfactory, if possible, to make the author of the scandal defendant. An action of slander will not lie ; but if he spoke the words under such circumstances as would ensure their being printed, or if in any other way he requested or contrived their publication in the paper, he is liable in an action of libel as the actual publisher. *Qui facit per alium facit per se.*

Illustrations.

If a manuscript in the handwriting of the defendant be sent to the printer or

publisher of a magazine, who prints and publishes it, the defendant will be liable for the full damages caused by such publication, although there is no proof offered that he expressly directed the printing and publishing of such manuscript.

Bond v. *Douglas*, 7 C. & P. 626.
R. v. *Lovett*, 9 C. & P. 462.
Burdett v. *Abbot*, 5 Dow, H. L. 201 ; 14 East, 1.

And this is so, although the editor has cut the article up, omitting the most libellous passages and only publishing the remainder.

Tarpley v. *Blabey*, 2 Bing. N. C. 437 ; 2 Scott, 642 ; 1 Hodges, 414 ; 7 C. & P. 395.
Pierce v. *Ellis*, 6 Ir. C. L. R. 55.
Strader v. *Stryder*, 67 Ill. 404.

A newspaper reporter told defendant he should read defendant's statements to the paper for publication. Defendant replied, "Let them go." *Held*, that defendant had published them in the paper.

Clay v. *People*, 86 Ill. 147.

So where Cooper told the editor several good stories against the Rev. J. K., and asked him to "show Mr. K. up ;" and subsequently the editor published the substance of them in the newspaper, and Cooper read it and expressed his approval ; this was held a publication by Cooper, although the editor knew of the facts from other quarters as well.

R. v. *Cooper*, 15 L. J. Q. B. 206 ; 8 Q. B. 533.
And see *Adams* v. *Kelly*, Ry. & Moo. 157 ; and the judgments of Byles and Mellor, JJ., in the next case, L. R. 4 Ex. 181—186.

At the meeting of the board of guardians, at which reporters were present, it was stated that the plaintiff had turned his daughter out of doors, and that she consequently had been admitted into the workhouse and had become chargeable to the parish. Ellis, one of the guardians, said, "I hope the local press will take notice of this very scandalous case," and requested the [*157] chairman, Prescott, to give an outline of it. This Prescott did, remarking, "I am glad gentlemen of the press are in the room, and I hope they will give publicity to the matter." Ellis added, "And so do I." From the notes taken in the room the reporters prepared a condensed account which appeared in the local newspapers, and which, though partly in the reporter's own language, was substantially a correct report of what took place at the meeting. *Held*, by the majority of the Court of Exchequer Chamber (Montague Smith, Keating and Hannen, JJ., Byles and Mellor, JJ., dissenting), that Martin, B., was wrong in directing the jury that there was no evidence to go to the jury that Prescott and Ellis had directed the publication of the account which appeared in the papers. [N. B.—Of the six judges concerned, three were of one opinion, three of the other.]

Parkes v. *Prescott and Ellis*, L. R. 4 Ex. 169 ; 38 L. J. Ex. 105 ; 17 W. R. 773 ; 20 L. T. 537.

But though merely composing a libel without publishing it is not actionable, merely publishing it, not having composed it, *is* actionable. "The mere delivery of a libel to a third person by one conscious of its contents amounts to a publication and is an indictable offence." (Per Wood, B., in *Maloney* v. *Bartley*, 3 Camp. 213.) "If one reads a libel, that is no publication of it ; or if he hears it read, it is no publication of it ; for before he reads or hears it, he cannot know it to be a libel ; or if he hears or reads it, and laughs at it, it is no publication of it ; or if he writes a copy of it, and does not publish it to others, it is no publication of the libel ; but if after he has read or heard it, he repeats it, or any part of it, in the hearing of others, or after that he knows it to be a libel, he reads it to others, that is an unlawful publication of it." (Per Lord Coke in *John Lamb's Case*, 9 Rep. 60.)

Every one who prints or publishes a libel may be sued by the person defamed ; and to such an action it is no defence that another wrote it ; it is no defence that it was printed or published by the desire or procurement of another, whether that other be made a defendant to the action or not. All concerned in publishing the libel or in procuring it to be published are equally responsible with the author. And printing the libel, or causing it to be printed, is *primâ facie* evidence of publication. (*Burdett* v. [*158] *Abbot*, 5 Dow, H. L. at p. 201 ; *Baldwin* v. *Elphinston*, 3 W. Bl. 1037.) If the libel appear in a newspaper, the proprietor, the editor, the printer, and the publisher, are liable to be sued; either separately or together. In all cases of joint publication each defendant is liable for all the ensuing damage. And there is no contribution between tort-feasors. So that the proprietor of a paper sued jointly with his careless editor or with the actual composer of the libel cannot compel either of his co-defendants to recoup him the damages, which he has been compelled to pay the plaintiff. (*Colburn* v. *Patmore*, 1 C. M. & R. 73 ; 4 Tyr. 677.)

But if there be two distinct and separate publications of the same libel, a defendant who was concerned in the first publication, but wholly unconnected with the second, would not be liable for any damages which he could prove to have been the consequence of the second publication and in no way due to the first. Nor, on the other hand, should the fact that other actions have been brought for other publications of the same libel be taken into consideration by the jury in assessing the damage arising from the publication by the present defendant. (*Harrison* v. *Pearce*, 1 F. & F. 567 ; 32 L. T. (Old S.) 298 ; *Tucker* v. *Lawson*,, 2 Times L. R. 593 ; and see *post*, p. 316.)

And here I will cite the remarks of Best, C. J., in *De Crespigny* v. *Wellesley* (5 Bing. pp. 402—406) : "If a man receives a letter with authority from the author to publish it, the person receiving it will not be justified, if it contains libellous matter, in inserting it in the newspapers. No authority from a third person will defend a man against an action brought by a person who has suffered from an unlawful act. If the receiver of a letter publish it without authority, he is, from his own motion, the wilful circulator of slander. . . If the person receiving a libel may publish it at all, he may publish it in whatever manner he pleases ; he may insert it in all the journals, and thus circulate the calumny through every region of the globe. The effect of this is very different from that of the repetition of oral slander. In the latter case, what has been said is known only to a [*159] few persons, and if the statement be untrue, the imputation cast upon any one may be got rid of ; the report is not heard of beyond the circle in which all the parties are known, and the veracity of the accuser, and the previous character of the accused, will be properly estimated. But if the report is to be spread over the world by means of the press, the malignant falsehoods of the vilest of mankind, which would not receive the least credit where the author is known, would make an impression which it would require much time and trouble to erase, and which it might be difficult, if

not impossible, ever completely to remove. . . Before he gave it general notoriety by circulating it in print, he should have been prepared to prove its truth to the letter ; for he had no more right to take away the character of the plaintiff, without being able to prove the truth of the charge that he made against him, than to take his property without being able to justify the act by which he possessed himself of it. Indeed, if we reflect on the degree of suffering occassioned by loss of character, and compare it with that occasioned by loss of property, the amount of the former injury far exceeds that of the latter."

Illustrations.

A man may thus be guilty both of libel and of slander at the same moment and by the same act ; as, by reading to a public meeting a defamatory paper written by another. (See Precedent, No. 4, App. A.)

Hearne v. *Stowell*, 12 A. & E. 719 ; 6 Jur. 458 ; 4 P. & D. 696.

Hudson brought the manuscript of a libellous song to Morgan to have 1,000 copies printed ; Morgan printed 1,000 and sent 300 to Hudson's shop. Hudson gave several copies to a witness who sung it about the streets. It did not appear in whose writing the manuscript was ; but probably not in Hudson's. *Held*, that both Hudson and Morgan had published the libel.

Johnson v. *Hudson and Morgan*, 7 A. & E. 233, n. ; 1 H. & W. 680.

The proprietor of a newspaper is always liable for whatever appears in its columns ; although the publication may have been made without his knowledge and in his absence.

R. v. *Walter*, 3 Esp. 21.

Storey v. *Wallace*, 11 Ill. 51.

Scripps v. *Reilly*, 38 Mich. 10.

But now in criminal cases, see 6 & 7 Vict. c. 96, s. 7.

R. v. *Holbrook and others*, 3 Q. B. D. 60 ; 4 Q. B. D. 42 ; 47 L. J. Q. B. 35 ; 48 L. J. Q. B. 113 ; 26 W. R. 144 ; 27 W. R. 313 ; 37 L. T. 530 ; 39 L. T. 536.

So is the printer ; though he had no knowledge of the contents.

R. v. *Dorer*, 6 How. St. Tr. 546 ; and see 2 Atkyns, at p. 472.

[*160] So, in England, the acting editor is always held liable.

Watts v. *Fraser and another*, 7 C. & P. 369 ; 7 Ad. & E. 223 ; 1 M. & Rob. 449 ; 2 N. & P. 157 ; 1 Jur. 671 ; W. W. & D. 451.

In America, however, though the proprietor and printer of a paper are always held liable, the editor is, it would seem, allowed to plead as a defence that the libel was inserted without his orders and against his will.

The Commonwealth v. *Kneeland*, Thacher's C. C. 346.

Or without any knowledge on his part that the article was a libel on any particular individual.

Smith v. *Ashley*, (1846), 52 Mass. (11 Met.) 367.

The proprietor of a newspaper is liable even for an advertisement inserted and paid for by Bingham ; although the plaintiff is bringing another action against Bingham at the same time.

Harrison v. *Pearce*, 1 F. & F. 567 ; 32 L. T. (Old S.) 298.

"If you look upon the editor as a person who has published a libellous advertisement incautiously, of course he is liable." Per Pollock, C. B., in

Keyzor and another v. *Newcomb*, 1 F. & F. 559.

If a country newspaper copy and publish a libellous article from a London newspaper, the country paper makes the article its own, and is liable for all damages resulting from its publication in the country. The fact that it had previously appeared in the London paper is no defence ; it will not even tend to mitigate the damages.

Talbutt v. *Clark*, 2 M. & Rob. 312.

Saunders v. *Mills*, 3 M. & P. 520 ; 6 Bing. 213.

Evidence that the plaintiff had in a previous action recovered damages against

the London paper for the same article is altogether inadmissable; as in that action damages were given only for the publication of the libel in London.

Creevy v. *Carr*, 7 C. & P. 64.

And see *Hunt* v. *Algar and others*, 6 C. & P. 245.

If I compose a libel and leave it in my desk among my papers, and my clerk surreptitiously takes a copy and sends it to the newspapers, it is submitted that he alone is liable for the damage caused thereby. I am liable only to such damages as the jury may award for the negligent though unintentional publication to my clerk. For although he could not have taken a copy, had I not first written the libel, still the subsequent republication of it is my clerk's own independent act, for the consequences of which he alone is liable. *Seeus*, if I in any way encouraged or contrived his taking a copy, knowing that he would be sure to publish it in the newspapers.

So, again, every sale or delivery of a written or printed copy of a libel is a fresh publication; and every person who sells or gives away a written or printed copy of a libel may be made a defendant, unless, indeed, he can satisfy the jury that he was ignorant of the contents. The *onus* of proving this lies on the defendant, and where he has made a large profit by selling a great many copies of a [*161] libel, it will be very difficult to persuade the jury that he was not aware of its libellous nature. (*Chub* v. *Flannagan*, 6 C. & P. 431.) But if the paper was sold in the ordinary way of business by a newsvendor who neither wrote nor printed the libel, and who neither knew nor ought to have known that the paper he was so selling did contain or was likely to contain any libellous matter, he will not be deemed to have published the libel which he thus innocently disseminated.

It makes no difference in law whether the libel is sold to the public or whether a copy is merely shown confidentially to a friend. Each is equally a publication. But the jury will, in estimating the damages, attach great importance to the mode of publication: as an indiscriminate public sale must inflict much more serious injury on the plaintiff's reputation. The defendant could not afterwards recall or contradict his statements, did he desire to do so. (See per Lord Denman, C. J., 9 A. & E. 149.)

Illustrations.

The plaintiff's agent, with a view to the action, called at the office of the defendant's newspaper, and made them find for him a copy of the paper that had appeared seventeen years previously, and bought it. *Held*, that this was a fresh publication by the defendant, and that the action lay in spite of the Statute of Limitations."

Duke of Brunswick v. *Harmer*, 14 Q. B. 185; 19 L. J. Q. B. 20; 14 Jur. 110; 3 C. & K. 10.

A porter who, in the course of business, delivers parcels containing libellous hand-bills, is not liable in an action for libel, if shown to be ignorant of the contents of the parcel, for he is but doing his duty in the ordinary way.

Day v. *Bream*, 2 M. & Rob. 54.

A servant carries a libellous letter for his master, addressed to C. It is his duty not to read it. If he does read it, that is a publication by his master to him, although he was never intended to read it. If after reading it he delivers it to C. then this is a publication by the servant to C., for which the person libelled, not being C., can sue either the master, or the servant, or both. If the servant never reads it, but simply delivers it as he was bidden, then he is not liable to any action, unless he either knew or ought to have known that he was being

employed illegally. If he either knew or ought to have known, then it is no defence of him to plead "I was only obeying orders."

The defendant kept a pamphlet shop; she was sick and upstairs in bed; a libel was brought into the shop without her knowledge, and subsequently sold [*162] by her servant on her account. She was held criminally liable for the act of her servant, on the ground that "the law presumes that the master is acquainted with what his servant does in the course of his business."

R. v. *Dodd*, 2 Sess. Cas. 33.

Nutt's Case, Fitzg. 47; 1 Barnard. 306.

But later judges would not be so strict; the sickness upstairs, if properly proved by the defendant, would now be held an excuse.

R. v. *Almon*, 5 Bur. 2686.

R. v. *Guteh, Fisher and Alexander*, Moo. & Mal. 433.

And in *criminal* cases, see 6 & 7 Vict. c. 96, s. 7 *post*, p. 433.

A rule was granted calling on Wiatt to show cause why he should not be attached for selling a book containing a libel on the Court of King's Bench. The book was in Latin. On filing an affidavit that he did not understand Latin, and on giving up the name of the printer from whom he obtained it, and the name of the author, the rule was discharged.

R. v. *Wiatt* (1722,) 8 Mod. 123.

The defendants were newsvendors on a large scale at the Royal Exchange. In the ordinary course of their business they sold several copies of a newspaper called "Money," which contained a libel on the plaintiff. The jury found that the defendants did not, nor did either of them, know that the newspapers at the time they sold them contained libels on the plaintiff; that it was not by negligence on the defendants' part that they did not know there was any libel in the newspapers; and that the defendants did not know that the newspaper was of such a character that it was likely to contain libellous matter, nor ought they to have known so. *Held*, that defendants had not published the libel, but had only innocently disseminated it.

Emmens v. *Pottle & Son*, (C. A.) 16 Q. B. D. 354; 55 L. J. Q. B. 51; 34 W. R. 116; 53 L. T. 808; 50 J. P. 228.

Every repetition of a slander is a wilful publication of it, rendering the speaker liable to an action. "Tale-bearers are as bad as tale-makers."* It is no defence that the speaker did not originate the scandal, but heard it from another, even though it was a current rumour and he *bonâ fide* believed it to be true. (*Watkin* v. *Hall*, L. R. 3 Q. B. 396; 37 L. J. Q. B. 125; 16 W. R. 857; 18 L.T. [* 163] 561). It is no defence that the speaker at the time named the person from whom he heard the scandal. (*M'Pherson* v. *Daniels*, 10 B. & C. 270; 5 M. & R. 251.)

This proposition, it is submitted, correctly states the existing law on the point; but it would certainly not have been accepted as clear law in the last century. Great difficulty was presented by the fourth resolution in *Lord Northampton's Case* (in the Star Chamber, 1613), 12 Rep. 134, which runs as follows:—"In a private action for slander of a common person, if J. S. publish that he hath heard J. N. say that J. G. was a traitor or thief; in an action of the case, if the truth be such, he may justify. But if

* Mrs. Cam. "But surely you would not be quite so severe on those who only repeat what they hear?"

Sir Pet. "Yes, Madam, I would have law merchant for them too; and in all cases of slander currency whenever the drawer of the lie was not to be found, the injured parties should have a right to come on any of the indorsers."—*The School for Scandal.*

J. S. publish that he hath heard generally without a certain author, that J. G. was a traitor or thief, there an action *sur le case* lieth against J. S. for this, that he hath not given to the party grieved any cause of action against any but against himself who published the words, although that in truth he might hear them ; for otherwise this might tend to a great slander of an innocent ; for if one who hath *læsam phantasiam*, or who is a drunkard, or of no estimation, speak scandalous words, if it should be lawful for a man of credit to report them generally that he had heard scandalous words, without mentioning of his author, that would give greater colour and probability that the words were true in respect of the credit of the reporter, than if the author himself should be mentioned."

Now, in the first place, the reason here assigned for the distinction applies only to cases in which the originator of the scandal is of less credit than the retailer of it, and is known to be so by those to whom it is retailed. If those who hear the tale repeated know nothing of the person cited as the authority for it, it is to them precisely as if the name were omitted altogether, and it had been told as an *on dit*. If, on the other hand, the person named as the author of the assertion is of greater credit and respectability than the reporter, vouching his authority clearly does the plaintiff's reputation a greater injury than if no name had been given at all. And even in the case where the author of the story is well known to be a person of no credit, how does that excuse the defendant's act in repeating and circulating it? It appears to me to make it all the worse ; he cannot even plead :—"I had it on good authority and reasonably believed it true." By the mere repetition of it the defendant endorses and gives credit to the tale, although he states that he heard it from A. B. ; and those who hear it from him will repeat it everywhere, and cite as their [*164] authority, not A. B., but the defendant, whom we presume to be of greater respectability and credit.

Again, on general principles, how can a slander by A. be any justification for a subsequent slander by B.? "Because one man does an unlawful act to any person, another is not to be permitted to do a similar act to the same person. Wrong is not to be justified, or even excused, by wrong." (Per Best, C. J., in *De Crespigny* v. *Wellesley*, 5 Bing. 404.)

Moreover, the twelfth volume of Reports is a book of questionable authority ; it was issued after Lord Coke's death, compiled by some one else from papers which Lord Coke had neither digested nor intended for the press. (See the remarks of Mr. Hargrave, 11 St. Tr. 301 ; of Holroyd, J., in *Lewis* v. *Walter*, 4 B. & Ald. 614 ; and of Parke, J., in *M'Pherson* v. *Daniels*, 10 B. & C. 275 ; 5 M. & R. 251.) The fourth resolution, as reported, appears inconsistent with the preceding resolution, the third ; and also with the many decisions in the case. And even if it be correctly reported, it is but an *obiter dictum*, for the Star Chamber had no jurisdiction over private slander, and the case before them was one of *scandalum magnatum*, which branch of the law is governed by special

statutes of its own. (See *ante*, pp. 134—137.) And, moreover, the defendant in that case had *not* in fact named his authority at the time, but only confessed it subsequently.

Still so great was the weight justly given to every word of my Lord Coke, that this resolution was assumed to be law in *Crawford* v. *Middleton* (1662), 1 Lev. 82 ; *Davis* v. *Lewis* (1796), 7 T. R. 17 ; and *Woolnoth* v. *Meadows* (1804), 5 East, 463 ; 2 Smith, 28. The last two cases decided that at all events it is too late to name the author of the report for the first time in the plea of justification ; he must be named at time of publication to raise any ground of defence under this resolution.

In *Maitland* v. *Goldney* (1802), 2 East, 426, Lord Ellenborough intimated that the doctrine did not apply where the reporter knew that his informant, whom he named, had *retracted* the charge since making it, or where for any other reason the reporter at the time of repeating the tale knew it was false, and unfounded. Next, in *Lewis* v. *Walter* (1821), 4 B. & Ald. 615, Holroyd and Best, JJ., expressed an opinion that the rule had been laid down too largely in the *Earl of Northampton's Case*, and ought to be qualified by confining it to cases where there is a fair and just reason for the repetition of the slander (that is, I presume, to cases where the repetition is privileged). Then, in February, 1829, the Court of Common Pleas decided that in actions of *libel* there was no such rule. (*De Crespigny* v. *Wellesley*, 5 Bing. 392, in which case Best, C. J., says :—"Of what use is it to [* 165] send the name of the author with a libel that is to pass into a country where he is entirely unknown : the name of the author of a statement will not inform those who do not know his character, whether he is a person entitled to credit for veracity or not ; whether his statement was made in earnest or by way of joke; whether it contains a charge made by a man of sound mind or the delusion of a lunatic.") And lately, in *M'Pherson* v. *Daniels*, 10 B. & C. 263 ; 5 M. & R. 251 (Michaelmas, 1829), the rule in *Lord Northampton's Case* was directly challenged and expressly overruled ; and it was held that for a defendant to prove that he said at the time that he heard the tale from A., and that A. did in fact tell it to the defendant, was no justification. It must be proved that the defendant repeated the story on a justifiable occasion, and in the *bonâ fide* belief in its truth [and that is a defence of privilege, see *Bromage* v. *Prosser*, 4 B. & C. 247 ; 6 D. & R. 296 ; 1 C. & P. 475, *post*, p. 207]. This decision has been approved of and followed in *Ward* v. *Weeks*, 7 Bing. 211 ; 4 M & P. 796 ; and in *Watkin* v. *Hall*, L. R. 3 Q. B. 396 ; 37 L. J. Q. B. 125 ; 16 W. R. 857 ; ; 18 L. T. 561 ; and see *Bennett* v. *Bennett*, 6 C. & P. 588.

And in America the law appears to be the same. (*Jarnigan* v. *Fleming*, 43 Miss. 711 ; *Treat* v. *Browning*, 4 Connecticut, 408 ; *Runkle* v. *Meyers*, 3 Yeates (Pennsylvania), 518 ; *Dole* v. *Lyon*, 10 Johns. (New York), 447 ; *Inman* v. *Foster*, 8 Wend. 602.)

Illustrations.

Woor told Daniels that M'Pherson's horses had been seized from the coach on the road, that he had been arrested, and that the bailiffs were in his house.

Daniels went about telling everyone, "Woor says that M'Pherson's horses have been seized from the coach on the road, that he himself has been arrested, and that the bailiffs are in his house." *Held*, that Daniels was liable to an action by M'Pherson for the slander, although he named Woor at the time as the person from whom he had heard it; that it was no justification to prove that Woor did in fact say so: defendant must go further and prove that what Woor said was true.

M'Pherson v. *Daniels*, 10 B. & C. 263; 5 M. & R. 251.

The defendant said to the plaintiff in the presence of others:—"Thou art a sheep-stealing rogue, and Farmer Parker told me so." *Held*, that an action lay.

It was urged that the plaintiff ought not to have judgment, because it was not averred that Farmer Parker did not tell the defendant so; but the Court was of opinion that such an averment was unnecessary, it being quite immaterial whether Farmer Parker did or did not tell the defendant so.

Gardiner v. *Atwater* (1756), Say. 265.

Lewes v. *Walter* (1617), 3 Bulstr. 225; Cro. Jac. 406, 413; Rolle's Rep. 444.

Meggs v. *Griffith*, Cro. Eliz. 400; Moore, 408; *ante*, p. 127.

Read's Case, Cro. Eliz. 645.

[* 166] The defendant said to the plaintiff, a tailor, in the presence of others: "I heard you were run away," *scilicet*, from your creditors. *Held*, that an action lay.

Davis v. *Lewis*, 7 T. R. 17.

Mr. and Mrs. Davies wrote a libellous letter to the Directors of the London Missionary Society, and sent a copy to the defendant, who published extracts from it in a pamphlet. The defendant stated that the letter was written by Mr. and Mrs. Davies, and at the time he wrote the pamphlet he believed all the statements made in the letter to be true. *Held*, no justification for his publishing it.

Tidman v. *Ainslie* (1854), 10 Exch. 63.

And see *Mills and wife* v. *Spencer and wife* (1817), Holt, N. P. 533.

M'Gregor v. *Thwaites* (1824), 3 B. & C. 24; 4 D. & R. 695.

A rumour was current on the Stock Exchange that the chairman of the S. E. Ry. Co. had failed; and the shares in the company consequently fell; thereupon the defendant said, "You have heard what has caused the fall—I mean, the rumour about the S. Eastern chairman having failed?" *Held*, that a plea that there was in fact such a rumour was no answer to the action.

Watkin v. *Hall*, L. R. 3 Q. B. 396; 37 L. J. Q. B. 125; 16 W. R. 857; 18 L. T. 561.

See *Richards* v. *Richards*, 2 Moo. & Rob. 557.

If at a meeting of a board of guardians charges were made against the plaintiff, this does not justify the owner of a newspaper in publishing them to the world: it is no justification to plead that such charges were in fact made, and that the alleged libel was an impartial and accurate report of what took place at such meeting.

Purcell v. *Sowler*, 1 C. P. D. 781; 2 C. P. D. 215; 46 L. J. C. P. 308; 25 W. R. 362; 36 L. T. 416.

Davison v. *Duncan*, 7 E. & B. 229; 26 L. J. Q. B. 104; 3 Jur. N. S. 613; 5 W. R. 253; 28 L. T. (Old S.) 265.

Popham v. *Pickburn*, 7 H. & N. 891; 31 L. J. Ex. 133; 8 Jur. N. S. 179; 10 W. R. 324; 5 L. T. 846.

And here note a great distinction between libel and slander. The actual publisher of a libel may be an innocent porter or messenger, a mere hand, unconscious of the nature of his act; and for which therefore his employers shall be held liable, and not he. Whereas in every case of the republication of a slander, the publisher acts consciously and voluntarily; the repetition is his own act. Therefore, if I am in any way concerned in the making or publishing of a libel, I am liable for all the damage that

ensues to the plaintiff from its publication. But if I slander A., I am only liable for such damages as result directly from that one utterance by my own lips. [*167] If B. hears me and chooses to repeat the tale, that is B.'s own act; and B. alone is answerable should damage to A. ensue. In an action against me such special damage would be too remote. For each publication of a slander is a distinct and separate act, and every person repeating it becomes an independent slanderer, and he alone is answerable for the consequences of his own unlawful act.

Thus, by the law of England, as it at present stands, the person who invents a lie and maliciously sets it in circulation may sometimes escape punishment altogether, while a person who is merely injudicious may be liable to an action through repeating a story which he believed to be the truth, as he heard it told frequently in good society. For if I originate a slander against you of such a nature that the words are not actionable *per se*, the utterance of them is no ground of action, unless special damage follows. If I myself tell the story to your employer, who thereupon dismisses you, you have an action against me; but if I only tell it to your friends and relations and no pecuniary damage ensues from my own communication of it to any one, then no action lies against me; although the story is sure to get round to your master sooner or later. The unfortunate man whose lips actually utter the slander to your master, is the only person that can be made defendant; for it is his publication alone which is actionable as causing special damage. The law is the same in America. (*Gough* v. *Goldsmith*, 44 Wis. 262; 28 Amer. R. 579; *Shurtleff* v. *Parker*, 130 Mass. 293; 39 Amer. R. 454.) But this apparent hardship only arises where the words are not actionable without proof of special damage. Where the words are actionable *per se*, the jury find the damages *generally*, and will judge from the circumstances which of the defendants is most to blame.

There are two apparent exceptions to this rule:

I. Where by communicating a slander to A., the defendant puts A. under a moral necessity to repeat it to some other person immediately concerned; here, if the defendant knew the relation in which A. stood to this other person, he will be taken to have contemplated this result when he spoke to A. In fact, here A.'s repetition is the natural and necessary consequence of the defendant's communication to A.

[*168] II. Where there is evidence that the defendant, though he spoke only to A., intended and desired that A. should repeat his words, or expressly requested him to do so: here the defendant is liable for all the consequences of A.'s repetition of the slander; for A. thus becomes the agent of the defendant. (As to Principal and Agent, see Law of Persons, c. XII., *post*, p. 411.)

Illustrations.

Weeks was speaking to Bryce of the plaintiff and said, "He is a rogue and a swindler; I know enough about him to hang him." Bryce repeated this to

Bryer as Weeks' statement. Bryer consequently refused to trust the plaintiff. *Held*, that the judge was right in nonsuiting the plaintiff: for the words were not actionable *per se*; and the damage was too remote.

Ward v. *Weeks*, 7 Bing. 211; 4 M. & P. 796.

The defendant's wife charged Mrs. Parkins with adultery. She indignantly told her husband, her natural protector: he was unreasonable enough to insist upon a separation in consequence. *Held*, that for the separation the defendant was not liable.

Parkins et ux. v. *Scott et ux.*, 1 H. & C. 153; 31 L. J. Ex. 331; 8 Jur. N. S. 593; 10 W. R. 562; 6 L. T. 394.

See *Dixon* v. *Smith*, 5 H. & N. 450; 29 L. J. Ex. 125.

H. told Mr. Watkins that the plaintiff, his wife's dressmaker, was a woman of immoral character; Mr. Watkins naturally informed his wife of this charge, and she ceased to employ the plaintiff. *Held* that the plaintiff's loss of Mrs. Watkins' custom was the natural and necessary consequence of the defendant's communication to Mr. Watkins.

Derry v. *Handley*, 16 L. T. 263.

See *Gillett* v. *Bullivant*, 7 L. T. (Old S.) 490.

Kendillon v. *Maltby*, 1 Car. & Marsh. 402.

It has sometimes been held, on the principle of *Volenti non fit injuria*, that if the only publication proved at the trial be one brought about by the plaintiff's own contrivance, the action must fail. Thus, in *King* v. *Waring et ux.*, 5 Esp. 15, Lord Alvanley decided, that if a servant, knowing the character which his master will give him, procures a letter to be written, not with a fair view of inquiring the character, but to procure an answer upon which to ground an action for a libel, no such action can be maintained. So in *Smith* v. *Wood*, 3 Camp. 323, where the plaintiff, hearing that defendant had in his possession a copy of a libellous caricature of the plaintiff, sent an agent who asked to see the picture, and the defendant showed it him at his request, Lord Ellenborough ruled that this was no sufficient evidence of publication and nonsuited the plaintiff.

[*169] But these cases, so far as the question of *publication* merely is concerned, must be taken to be overruled by *The Duke of Brunswick* v. *Harmer*, 14 Q. B. 185; 19 L. J. Q. B. 20; 14 Jur. 110; 3 C. & K. 10. Whether or no the plaintiff's conduct in himself provoking or inviting the publication on which he afterwards bases his action may amount to a ground of privilege as excusing the publication made, is a different question, which will be discussed *post*, pp. 234–238. And indeed in many of the older cases the judges say, "there is no sufficient publication to support the action," when they mean in modern parlance that the publication was privileged by reason of the occasion. (See judgment of Best, J., in *Fairman* v. *Ives*, 5 B. & Ald. 646; 1 D. & R. 252; 1 Chit. 85; and *Robinson* v. *May*, 2 Smith, 3.) And note that a publication induced by the prosecutor is sufficient in a criminal case. (*R.* v. *Carlile* 1 Cox, C. C. 229.)

CHAPTER VII.

[*170] JUSTIFICATION.

The truth of any defamatory words is, if pleaded, a complete defence to any action of libel or slander (though alone it is not a defence in a criminal trial). The *onus*, however, of proving that the words are true lies on the defendant. The falsehood of all defamatory words is presumed in the plaintiff's favour, and he need give no evidence to show they are false; but the defendant can rebut this presumption by giving evidence in support of his plea. If the jury are satisfied that the words are true in substance and in fact, they must find for the defendant, though they feel sure that he spoke the words spitefully and maliciously. On the other hand, if the words are false, and there be no other defence, the jury must find for the plaintiff, although they are satisfied that the defendant *bonâ fide* and reasonably believed the words to be true at the time he uttered them.

But the whole libel must be proved true, not a part merely. The justification must be as broad as the charge, and must justify the precise charge. If any material part be not proved true, the plaintiff is entitled to damages in respect of such part. (*Weaver* v. *Lloyd*, 1 C. & P. 295; 2 B. & C. 678; 4 D. & R. 230; *Ingram* v. *Lawson*, 5 Bing. N. C. 66; 6 Scott, 775; 7 Dowl. 125; 1 Arn. 387; 3 Jur. 73; 6 Bing. N. C. 212; 8 Scott, 471; 4 Jur. 151; 9 C. & P. 326.) Thus, where a libellous paragraph in a newspaper is introduced by a libellous heading, it is not enough to [*171] prove the truth of the facts stated in the paragraph, defendant must also prove the truth of the heading. (*Mountney* v. *Watton*, 72 B. & A. D. 673; *Chalmers* v. *Shackell*, 6 C. & P. 475.)

But where the gist of the libel consists of one specific charge which is proved to be true, defendant need not justify every expression which he has used in commenting on the plaintiff's conduct. Nor, if the substantial imputation be proved true, will a slight inaccuracy in one of its details prevent defendant's succeeding, provided such inaccuracy in no way alters the complexion of the affair, and would have no different effect on the reader than that which the literal truth would produce. (*Alexander* v. *N. E. Rail. Co.*, 34 L. J. Q. B. 152; 11 Jur. N. S. 619; 13 W. R. 651; 6 B. & S. 340; cf. *Stockdale* v. *Tarte*, 4 A. & E. 1016; *Blake* v. *Stevens*, 4 F. & F. 239; 11 L. T. 544.) If epithets or terms of general abuse be used which do not add to the sting of the charge, they need not be justified (*Edwards* v. *Bell*, 1 Bing. 403; *Morrison* v. *Harmer*, 3 Bing. N. C. 767; 4 Scott, 533; 3 Hodges, 108); but if they insinuate some further charge in addition to the main imputation, or imply some circumstance substantially aggravating

such main imputation, then they must be justified as well as the rest. (Per Maule, J., in *Helsham* v. *Blackwood*, 11 C. B. 129 ; 20 L. J. C. P. 192 ; 15 Jur. 861.) In such a case it will be a question for the jury whether the *substance* of the libellous statement has been proved true to their satisfaction. (*Warman* v. *Hine*, 1 Jur. 820 ; *Weaver* v. *Lloyd*, 2 B. & C. 678 ; 4 D. & R. 230 ; 1 C. & P. 295 ; *Behrens* v. *Allen*, 8 Jur. N. S. 118 ; 3 F. & F. 135.) "It would be extravagant," says Lord Denman (in *Cooper* v. *Lawson*, 8 Ad. & E. 753 ; 1 P. & D. 15 ; 1 W. W. & H. 601 ; 2 Jur. 919 ;) "to say that in cases of libel *every* comment upon facts requires a justification. A comment may introduce independent facts, a justification of which is necessary, or it may be the mere shadow of the previous imputation." And see *Lefroy* v. *Burnside* (No. 2), 4 L. R. Ir. 556.

[*172] So in criminal cases, if the whole of the plea of justification be not proved, the Crown will be entitled to a verdict. (*R.* v. *Newman*, 1 E. & B. 268, 558 ; 22 L. J. Q. B. 156 ; Dears. C. C. 85 ; 17 Jur. 617 ; 3 C. & K. 252.)

In actions of slander of title it would seem that the plaintiff has to prove that the words are false ; it does not lie on the defendant to prove them true. See *Burnett* v. *Tak*, 45 L. T. 743.

Illustrations.

The editor of one newspaper called the editor of another "a felon editor." Justification, that the plaintiff had been convicted of felony, and sentenced to twelve months' imprisonment. The Court of Appeal held the plea bad, for not averring that the plaintiff was still enduring the punishment when the words were uttered ; for that by the 9 Geo. 4, c. 32, s. 3, a person who has been convicted of felony, and who has undergone the full punishment, is in law no longer a felon. [A strong decision ; for ordinary readers unacquainted with that statute would surely understand "felon editor" to mean a man who had been convicted of felony, but was now out of prison, editing a paper. The felon when in prison is usually called a "convict."]

Leyman v. *Latimer*, 3 Ex. D. 15, 352 ; 47 L. J. Ex. 470 : 25 W. R. 751 ; 26 W. R. 305 ; 37 L. T. 360, 819 ; 14 Cox, C. C. 51.

Words complained of, that the plaintiff was a "libellous journalist." Proof that he had libelled one man, who had recovered from him damages £100, held insufficient.

Wakley v. *Cooke and Healey*, 4 Ex. 511 ; 19 L. J. Ex. 91.

Libel complained of :—that no boys had for the last seven years received instruction in the Free Grammar School at Lichfield, of which plaintiff was head master, and that the decay of the school seemed mainly attributable to the plaintiff's violent conduct. Plea of justification, that no boys had in fact received instruction in the school for the last seven years, and that the plaintiff had been guilty of violent conduct towards several of his scholars, was held bad on special demurrer, because it wholly omitted to connect the decay of the school with the alleged violence, and therefore left the second part of the libel unjustified.

Smith v. *Parker*, 13 M. & W. 459 ; 14 L. J. Ex. 52 ; 2 D. & L. 394.

Libel complained of :—"I see that the restoration of Skirlaugh Church has fallen into the hands of an architect who is a Wesleyan, and can have no experience in church work. Can you not do something to avert the irreparable loss which must be caused if any of the masonry of this ancient gem of art be ignorantly tampered with ?" Justification : "the facts contained in the letter are true, and the opinions expressed in it, whether right or wrong, were honestly held and expressed by the defendant." Particulars under this plea : "the

plaintiff cannot show experience in church work, *i. e.*, of the kind which in the opinion of the defendant was requisite." *Held*, that this was no justification at all, because the letter obviously meant that the plaintiff could show no experience [*173] in the work which he had been employed to execute. Verdict for the plaintiff. Damages £50.

Botterill and another v. *Whytehead*, 41 L. T. 588.

Libel complained of :—that the plaintiff had "*bolted*," leaving some of the tradesmen of the town to lament the fashionable character of his entertainment. Proof that he had *quitted* the town leaving some of his bills unpaid, held insufficient.

O'Brien v. *Bryant*, 16 M. & W. 168 ; 16 L. J. Ex. 77 ; 4 D. & L. 341.

Libel complained of :—that the plaintiff, having challenged his opponent to a duel, spent the whole of the night preceding in practising with his pistol, and killed his opponent, and was therefore guilty of murder. Proof that the plaintiff had killed his opponent, and had been tried for murder, held insufficient. For the charge of pistol practising was considered a separate and substantial charge, and it was not justified.

Helsham v. *Blackwood*, 11 C. B. 128 ; 20 L. J. C. P. 187 ; 15 Jur. 861.

The libel complained of was headed—"How Lawyer B. treats his Clients," followed by a report of a particular case in which *one* client of Lawyer B. had been badly treated. That particular case was proved to be correctly reported, but this was held insufficient to justify the heading, which implied that Lawyer B. *generally* treated his clients badly.

Bishop v. *Latimer*, 4 L. T. 775.

See also *Mountney* v. *Watton*, 2 B. & Ad. 673.

Chalmers v. *Shackell*, 6 C. & P. 475.

Clement v. *Lewis and others*, 3 Brod. & Bing. 297 ; 7 Moore, 200 ; 3 B. & Ald. 702.

Libel complained of :—that the plaintiff, a proctor, had three times been suspended from practice for extortion. Proof that he had *once* been so suspended was held insufficient.

Clarkson v. *Lawson*, 6 Bing. 266 ; 3 M. & P. 605 ; 6 Bing. 587 ; 4 M. & P. 356.

See also *Johns* v. *Gittings*, Cro. Eliz. 239.

Goodburne v. *Bowman and others*, 9 Bing. 532.

Clark v. *Taylor*, 2 Bing. N. C. 654 ; 3 Scott, 95 ; 2 Hodges, 65.

Blake v. *Stevens and others*, 4 F. & F. 232 ; 11 L. T. 543.

But when the libel complained of exposed the "homicidal tricks of those impudent and ignorant scamps who had the audacity to pretend to cure all diseases with one kind of pill," asserted that "several of the rotgut rascals had been convicted of manslaughter, and fined and imprisoned for killing people with enormous doses of their universal vegetable boluses," and characterized the plaintiffs' system as "one of wholesale poisoning ;" and it was proved at the trial "that the plaintiffs' pills, when taken in large doses, as recommended by the plaintiffs, were highly dangerous, deadly and poisonous," and "that two persons had died in consequence of taking large quantities of them ; and that the people who had administered these pills were tried, convicted, and imprisoned for the manslaughter of these two persons ;" this was held a sufficient justification, although the expressions "scamps," "rascals," and "wholesale [*174] poisoning had not been fully substantiated : the main charge and gist of the libel being amply sustained.

Morrison v. *Harmer*, 3 Bing. N. C. 767 ; 4 Scott, 533 ; 3 Hodges, 108.

Edsall v. *Russell*, 4 M. & Gr. 1090 ; 5 Scott, N. R. 801 ; 2 Dowl. N. S. 641 ; 12 L. J. C. P. 4 ; 6 Jur. 996.

Libel complained of :—"L., B. and G. are a gang who live by card-sharping." Pleas : not guilty, and a justification giving several specific instances in which persons named had been cheated by the trio at cards. *Held*, by Cockburn, C. J., when two specific instances had been proved, that the plea had been proved in substance, and that it was not necessary to prove the other instances alleged.

Reg. pros. Lambri v. *Labouchere*, 14 Cox, C. C. 419.

And see *Willmett* v. *Harmer and another*, 8 C. & P. 695.

The libel complained of was a notice published by a railway company to the effect that the plaintiff had been convicted of riding in a train for which his ticket was not available, and was sentenced to be fined £1, or to three weeks' imprisonment in default of payment. Proof that he had been so convicted and fined £1, and sentenced to a fortnight's imprisonment in default of payment, held sufficient; as the error could not have made any difference in the effect which the notice would produce on the mind of the public.

Alexander v. *N. E. R. Co.*, 34 L. J. Q. B. 152; 11 Jur. N. S. 619; 13 W. R. 651; 6 B. & S. 340.

But see *Gwynn* v. *S. E. R. Co.*, 18 L. T. 738.

Biggs v. *G. E. R. Co.*, 16 W. R. 908; 18 L. T. 482.

See also *Lay* v. *Lawson*, 4 Ad. & E. 795.

Edwards v. *Bell and others*, 1 Bing. 403.

Tighe v. *Cooper*, 7 E. & B. 639; 26 L. J. Q. B. 215; 3 Jur. N. S. 716.

This rule, that the whole of the libel must be justified to enable the defendant to succeed, applies to all cases of reported speeches or repetitions of slander. Thus, if the libel complained of be, "A. B. said that the plaintiff had been guilty of fraud, etc.," it is of no avail to plead that A. B. did in fact make that statement on the occasion specified. Each repetition is a fresh defamation, and the defendant by repeating A. B.'s words has made them his own, and is legally as liable as if he had invented the story himself. The only plea of justification which will be an answer to the action must not merely allege that A. B. did in fact say so, but must go on to aver with all necessary particularity that every statement which A. B. is reported to have made is true in substance and in fact. A previous publication by another of the same defamatory words is no [*175] justification for their repetition. (*See ante*, c. VI., Publication, pp. 162—168.) Still less is it any evidence of their truth. (*R.* v. *Newman*, 1 E. & B. 268, 558; 3 C. & K. 252; Dears. C. C. 85; 22 L. J. Q. B. 156; 17 Jur. 617.)

The opposite doctrine was laid down in the fourth resolution in the *Earl of Northampton's Case*, 12 Rep. 134, but that case never professed to apply to actions of libel, but to actions for slander only; and even in actions of slander it must now be taken not to be law. (See *ante*, pp. 163—165; *De Crespigny* v. *Wellesley*, 5 Bing. 392; 2 M. & P. 695; *M'Pherson* v. *Daniels*, 10 B. & C. 270; 5 M. & R. 251; *Watkin* v. *Hall*, L. R. 3 Q. B. 396; 37 L. J. Q. B. 125; 16 W. R. 857; 18 L. T. 561.)

It was considered that this rule pressed too severely upon newspaper proprietors and editors, who had in the ordinary course of their business presented to the public a full, true and impartial account of what really took place at a public meeting, considering no doubt that thereby they were merely doing their duty, whereas the law held them guilty of libel. And so the second section of the Newspaper Libel and Registration Act was passed in 1881 for their protection. (See *post*, p. 377.) Fair and accurate reports of judicial and parliamentary proceedings were already privileged (*post*, pp. 248—265.)

Illustrations.

Woor told Daniels that M'Pherson was insolvent; Daniels went about telling his friends "Woor says M'Pherson is insolvent." Proof that Woor had in fact

said so was held no answer to the action. Daniels was liable in damages unless he could also prove the truth of Woor's assertion.

M'Pherson v. *Daniels*, 10 B. & C. 263 ; 5 M. & R. 251.

A rumour was current on the Stock Exchange that the chairman of the S. E. R. Co. had failed ; and the shares of the company consequently fell ; thereupon the defendant said, "You have heard what has caused the fall—I mean, the rumour about the S. Eastern chairman having failed ?" *Held*, that a plea that there was in fact such a rumour was no answer to the action.

Watkin v. *Hall*, L. R. 3 Q. B. 396 ; 37 L. J. Q. B. 125 ; 16 W. R. 857 ; 18 L. T. 561.

Richards v. *Richards*, 2 Moo. & Rob. 557.

At a meeting of the West Hartlepool Improvement Commissioners, one of the commissioners made some defamatory remarks as to the conduct of the former secretary of the Bishop of Durham in procuring from the Bishop a license for the chaplain of the West Hartlepool cemetery. These remarks were reported in the local newspaper ; and the secretary brought an action against the owner of the newspaper for libel. A plea of justification, alleging that such remarks were in fact made at a public meeting of the commissioners, and that the alleged [*176] libel was an impartial and accurate report of what took place at such meeting, was held bad on demurrer.

Davison v. *Duncan*, 7 E. & B. 229 ; 26 L. J. Q. B. 104 ; 3 Jur. N. S. 613 ; 5 W. R. 253 ; 28 L. T. (Old S.) 265.

The defendants, the printers and publisher of the *Manchester Courier*, published in their paper a report of the proceedings at a meeting of the Board of Guardians for the Altrincham Poor Law Union, at which *ex parte* charges were made against the medical officer of the Union Workhouse at Knutsford, of neglecting to attend the pauper patients when sent for. *Held* that the matter was one of public interest ; but that the report was not privileged by the occasion, although it was admitted to be a *bonâ fide* and a correct account of what passed at the meeting ; and the plaintiff recovered 40s. damages and costs.

Purcell v. *Sowler*, 1 C. P. D. 781 ; affirmed on appeal, 2 C. P. D. 215; 46 L. J. C. P. 308 ; 25 W. R. 362 ; 36 L. T. 416.

See also *Pierce* v. *Ellis*, 6 Ir. C. L. R. 55.

So also a newspaper proprietor will be held liable for publishing a report made to the vestry by their medical officer of health, even although the vestry are required by Act of Parliament sooner or later to publish such report themselves.

Popham v. *Pickburn*, 7 H. & N. 891 ; 31 L. J. Ex. 133 ; 8 Jur. N.S. 179 ; 10 W. R. 324 ; 5 L. T. 846.

See also *Charlton* v. *Watton*, 6 C. & P. 385.

So even in reports of judicial proceedings, which if fair and accurate are privileged, if the reporter merely sets out the facts as stated by counsel for one party, and does not give the evidence, or merely says that all that counsel stated was proved, a justification that counsel did in fact say so, and that all he stated was in fact proved, is insufficient, the facts stated by counsel must also be justified and proved.

Lewis v. *Walter*, 4 B. & Ald. 605.

Saunders v. *Mills*, 3 M. & P. 528 ; 6 Bing. 218.

See also *Flint* v. *Pike*, 4 B. & C. 473 ; 6 D. & R. 520 ; and the remarks of Lord Compbell in

Lewis v. *Levy*, E. B. & E. 544 ; 4 Jur. N. S. 970 ; 27 L. J. Q. B. 282.

It is libellous to publish a highly-coloured account of judicial proceedings, mixed with the reporter's own observations and conclusions upon what passed in Court, containing an insinuation that the plaintiff had committed perjury ; and it is no justification to pick out such parts of the libel as contain an account of the trial, and to plead that such parts are true and accurate, leaving the extraneous matter altogether unjustified.

Stiles v. *Nokes*, 7 East, 493 ; same case *sub nomine Carr* v. *Jones*, 3 Smith, 491.

At the same time a defendant may in mitigation of damages justify as to one particular part of the libel, provided such

part contains imputations distinct from the rest. (Per Tindal, C. J., in *Clarke* v. *Taylor*, 2 Bing. N. C. 664 ; 3 Scott, 95 ; 2 Hodges, 65.) So he may justify as to one [*177] part, and plead privilege to the rest, or deny that he ever spoke or published the rest of the words. But in all these cases the part selected must be severable from the rest so as to be intelligible by itself, and must also convey a distinct and separate imputation against the plaintiff. (*M'Gregor* v. *Gregory*, 11 M. & W. 287 ; 12 L. J. Ex. 204 ; 2 Dowl. N. S. 769 ; *Churchill* v. *Hunt*, 2 B. & Ald, 685 ; 1 Chit. 480 ; *Roberts* v. *Brown*, 10 Bing. 519 ; 4 M. & Scott, 407 ; *Biddulph* v. *Chamberlayne*, 17 Q. B. 351.)

Again where the words are laid with an innuendo in the statement of claim, the defendant may justify the words, either with or without the meaning alleged in such innuendo ; or he may do both. (*Watkin* v. *Hall*, L. R. 3 Q. B. 396 ; 37 L. J. Q. B. 125 ; 16 W. R. 857 ; 18 L. T. 561.) That is, he may deny that the plaintiff puts the true construction on his words, and assert that, if taken in their natural and ordinary meaning, his words will be found to be true ; or he may boldly allege that the words are true, even in the worst signification that can be put upon them. But it seems that a defendant may not put a meaning of his own on the words, and say that in that sense they are true ; for if he deny that the meaning assigned to his words in the statement of claim is the correct one, he must be content to leave it to the jury at the trial to determine what meaning the words naturally bear.) *Brembridge* v. *Latimer*, 12 W. R. 878 ; 10 L. T. 816.) Nor may he plead : "I did not publish precisely the words stated in the claim ; but something similar, and that something similar is true in substance and in fact." In Ireland the defendant must justify the innuendo as well as the words. (*Hort* v. *Reade*, Ir. R. 7 C. L. 551.)

A justification must always be specially pleaded, and with sufficient particularity to enable plaintiff to know precisely what is the charge he will have to meet. If the libel makes a vague general charge, as for instance, that the plaintiff is a swindler, it is not sufficient to plead that he is [*178] a swindler. The defendant must set forth the specific facts which he means to prove in order to show that the plaintiff is a swindler. (*I'Anson* v. *Stuart*, 1 T. R. 748.) A plea of justification is always construed strictly against the party pleading it. (*Leyman* v. *Latimer*, 3 Ex. D. 15, 352.) It must justify the whole of the words to which it is pleaded, and it must set forth facts issuably. (*Jones* v. *Stevens*, 11 Price, 235 ; *Newman* v. *Baily*, 2 Chit. 665 ; *Holmes* v. *Catesby*, 1 Taunt. 543.) "The plea ought to state the charge with the same precision as in an indictment." (Per Alderson, B., in *Hickinbotham* v. *Leach*, 10 M. & W. 363 ; 2 Dowl. N. S. 270.) And at the trial it must be proved as strictly as an indictment for the offence it imputes. (Per Tindal, C. J., in *Chalmers* v. *Shackell*, 6 C. & P. at p. 478. Per Lord Denman, C. J., in *Wilmett* v. *Harmer*, 8 C. & P. at p. 697.] Indeed it is said that if words amount to a charge of felony, and the defendant justifies, and the jury find the plea proved, the plaintiff may at once be put upon his trial before a

petty jury, without the necessity of any bill being found by a grand jury. (Per Lord Kenyon in *Cook* v. *Field*, 3 Esp. 134. See the note to *Prosser* v. *Rowe*, 2 C. & P. 422; *Johnston* v. *Browning*, 6 Mod. 217.)

Placing a justification on the record is not by itself evidence of malice on the part of the defendant; but it may aggravate the damages, if the defendant either abandons the plea at the trial or fails to prove it. (*Warwick* v. *Foulkes*, 12 M. & W. 508; *Wilson* v. *Robinson*, 7 Q. B. 68; 14 C. J. Q. B. 196; 9 Jur. 726; *Simpson* v. *Robinson*, 12 Q. B. 511; 18 L. J. Q. B. 73; 13 Jur. 187; *Caulfield* v. *Whitworth*, 16 W. R. 936; 18 L. T. 527.)

In a criminal case it is not sufficient to prove the truth of the libel; the defendant must also prove that it was for the public benefit that the matters charged should be published (6 & 7 Vict. c. 96, s. 6, *post*, p. 437). And indeed before 1843 the truth of the libel was no defence at all to an indictment; the maxim prevailed, "the greater the truth the greater the libel." Yet it was always otherwise with a civil action; there the truth was always a complete defence. For in [*179] a civil action the benefit or detriment to the public is not in issue; the plaintiff is seeking to put in his own pocket damages for an alleged injury to a character to which he had no right. In the vast majority of cases it is clearly right that culprits should be made to appear in their true colors: *peccata enim nocentium nota esse et oportere et expedire.*"—*Paulus.* And some men may be deterred from committing an act of dishonesty or immorality by the knowledge that, if discovered, it may always be brought up against them, wherever they go, to the end of their lives. But in other cases where a man has retrieved his character by long years of good behaviour, it is clearly *morally* wrong for one who knows of his early delinquencies to come and blast the reputation which he has fairly earned. It has, therefore, been urged that an action ought to lie, where the plaintiff's antecedents have been maliciously raked up and wantonly published to the world, without any benefit to society. Prisoners constantly complain that it is impossible for them to earn a livelihood by honest labour on coming out of prison, because as soon as they obtain employment anywhere, the police inform their master of the fact of their previous conviction, and they are at once discharged. And in a recent case, *R.* v. *Seymore*, Winchester Spring Assizes, 1880, counsel intimated that it was the rule in the West of England for policemen so to do. But Mr. Justice Hawkins at once "expressed his opinion that it was not the duty of the police to do so. The police, he considered, ought to be the friends of released criminals and help them to return to an honest life. That they should go and inform those who had given a convict employment of the fact of his having been convicted was simply to drive the convict into crime again. He was aware that this was done in many parts of the country, but he for his part thought that it should not be. It was an unnecessary, an officious, and a cruel act; and the result of it was that once a man was convicted he was branded for the rest of his life, and a return to

honesty was made most difficult for him."—*Times*, for April 23rd, 1880.

No doubt it is part of the punishment of a criminal that he can never escape from his misdeeds; but nevertheless, to unduly proclaim them is malicious and uncharitable. Yet it is difficult to see how any change can be made in the law in this respect. No law can be framed which cannot be made to press harshly on individuals under exceptionable circumstances and in the hands of uncharitable persons. And as a rule the strictness with which a defendant is made to brave [*180] his plea of justification, is a sufficient protection to a plaintiff; for if a man is really malicious in making a statement, he is almost sure to go beyond the truth, and say too much.

In Rome the truth of the libel was a defence both to criminal and to civil proceedings. "Eum qui nocentem infamavit non esse bonum æquum ob eam rem condemnari."—Pauli Sent. V. 4. So in Horace, Sat. II. 1, 83—5.

> "bona [carmina] si quis
> Judice condiderit laudatur Cæsare; si quis
> Opprobriis dignum laceraverit, integer ipse."

CHAPTER VIII.

[*181] PRIVILEGED OCCASIONS.

It is a defence to an action of libel or slander to prove that the circumstances under which the defamatory words were written or spoken were such as to make it right that the defendant should plainly state what he honestly believed to be the plaintiff's character, and speak his mind fully and freely concerning him. In such a case, the occasion is said to be *privileged*, and though the statement may now be proved or admitted to be false, still its publication on such privileged occasion is excused for the sake of common convenience, and in the interests of society at large.

Illustrations.

I am called as a witness, and sworn to speak the truth, the whole truth, and nothing but the truth. I may do so without fear of any legal liability, even though I am thus compelled to defame my neighbour.

I am asked for a character of my late servant by one to whom he has applied for a situation. I may state in reply all I know against him without being liable to an action; provided I do so honestly and truthfully to the best of my ability.

A friend recently come to live in the town privately asks my opinion as to such and such a lawyer, doctor, tradesman, workman, &c. I may tell him in answer all I know concerning each of them; both as to their skill and ability in their business, and also as to their private character, their integrity, or immorality; provided I do not maliciously exaggerate, or deliberately mis-state, the facts.

Privileged occasions are of two kinds:—

(i) Those absolutely privileged.

(ii) Those in which the privilege is but qualified.

[*182] In the first class of cases it is so much to the public interest that the defendant should speak out his mind fully and fearlessly, that all actions in respect of words spoken thereon are absolutely forbidden, even though it be alleged that the words were spoken falsely, knowingly, and with express malice. This is confined to cases where the public service, or the due administration of justice, requires complete immunity, *e. g.*, words spoken in Parliament; reports of military officers on military matters to their military superiors; everything said by a judge on the bench, by a witness in the box, &c., &c. In all these cases the privilege afforded by the occasion is an *absolute* bar to any action.

In less important matters, however, the interests of the public do not demand that the speaker should be freed from *all* responsibility, but merely require that he should be protected so far as he is speaking honestly for the common good; in these cases the privilege is said not to be *absolute* but *qualified* only; and the plaintiff will

recover damages in spite of the privilege, if he can prove that the words were not used *bonâ fide* but that the defendant availed himself of the privileged occasion wilfully and knowingly to defame the plaintiff.

Illustrations

If a witness in the box volunteers a defamatory remark, quite irrelevant to the cause in which he is sworn, with a view of gratifying his own vanity, and of injuring the professional reputation of the plaintiff, no action lies against such witness; the words are still absolutely privileged; for they were spoken in the box.

Seaman v. *Netherclift*, 1 C. P. D. 540; 45 L. J. C. P. 798; 24 W. R. 884; 34 L. T. 878; 2 C. P. D. 53; 46 L. J. C. P. 128; 25 W. R. 159; 35 L. T. 784.

But if I maliciously give a good servant a bad character in order to prevent her "bettering herself," and so to compel her to return to my own service, the case is thereby taken out of the privilege, and the servant may recover heavy damages.

Jackson v. *Hopperton*, 16 C. B. (N. S.) 829; 12 W. R. 913; 10 L. T. 529.

In Roman law an intention to injure the plaintiff was essential to the action for *injuria*, (D. 47. 10. 3. 3 & 4.) Hence they never pre- [* 183] sumed malice; the plaintiff had to prove that the defendant expressly intended to impair his good name. Thus, if an astrologer or soothsayer in the *bonâ fide* practice of his art, denounces A. as a thief when he is an honest man, A. has no action: for the astrologer only committed an honest mistake. But it would be otherwise if the soothsayer did not really believe in his art, but pretended, after some jugglery, to arrive at A.'s name from motives of private enmity. (D. 47. 10. 15. 13.) That being so, it was unnecessary for the Romans to have any law as to *qualified* privilege; unless there was some evidence of malice the plaintiff was in every case non-suited. But neither did they allow any *absolute* privilege; on express malice proved the plaintiff recovered. Even the fact that the libel was contained in a petition sent to the Emperor was no protection. (D. 47. 10. 15. 29.) If a prefect or other official in the course of his duty charged a man with crime, he was not liable to an action if he did so in the belief that the charge was true, and without any malicious intention of publicly defaming the man; but if, in a sudden quarrel, he made the charge in the heat of the moment, and without any ground for the accusation, then he would be liable to an action when his term of office had expired, unless the Statute of Limitations would help him. (Rescript to Victorinus, A.D. 290; Krueger's Codex, ed. 1877, p. 855.) Two adversaries in litigation were of course allowed great latitude; a certain amount of mutual defamation being essential to the conduct of the case, and so not malicious: but even here moderation had to be observed. (Pauli Sent. V. iv. 15.) The Roman plan had at least the merit of simplicity.

Whether the communication is, or is not, privileged by reason of the occasion, is a question for the judge alone, where there is no dispute as to the circumstances under which it was made. (*State* v. *Griffith*, L. R. 2 P. C. 420; 6 Moore, P. C. C. N. S. 18; 20 L. T. 197.)

If there be any doubt as to these circumstances, the jury must find what the circumstances in fact were, or what the defendant honestly believed them to be, if that be the point to be determined; and then, on their findings, the judge decides whether the occasion was privileged or not, If the occasion was not privileged, and the words are defamatory and false, thejudge will direct a verdict for the plaintiff. If the [* 184] occasion was absolutely privileged, judgment will at once be given for the defendant. If, however, the judge decides that the occasion was one of qualified privilege only, the plaintiff must then, if he can, give evidence of actual malice on the part of the defendant. If he gives no such evidence, it is the duty of the judge to nonsuit him, or to direct a verdict for the defendant. If he does give any evidence of malice sufficient to go to the jury, then it is a question for the jury whether or no the defendant was actuated by malicious motives in writing or speaking the defamatory words. (See c. IX, Malice, *post*, p. 269.)

PART I.

OCCASIONS ABSOLUTELY PRIVILEGED.

In certain cases it is "advantageous for the public interest that persons should not in any way be fettered in their statements," but should speak out the whole truth freely and fearlessly. In these cases the privilege is absolute, and no action lies for words spoken on such an occasion ; the plaintiff cannot be heard to say that the defendant did not act under the privilege, that he did not intend honestly to discharge a duty, but maliciously availed himself of the privileged occasion to injure the plaintiff's reputation.

There are not many such cases, nor is it desirable that there should be many. The Courts refuse to extend their number. (*Stevens* v. *Sampson*, 5 Ex. D. 53 ; 49 L. J. [* 185] Q. B. 120 ; 28 W. R. 87 ; 41 L. T. 782.) They may be grouped under three heads :—

(i) Parliamentary proceedings.
(ii) Judicial proceedings.
(iii) Naval and military affairs, &c.

"I take this to be a rule of law not founded, as is the protection in other cases of privileged statements, on the absence of malice in the party sued, but founded on public policy, which requires that a judge, in dealing with the matter before him, a party in preferring or resisting a legal proceeding, and a witness in giving evidence, oral or written, in a court of justice, shall do so with his mind uninfluenced by the fear of an action for defamation or a prosecution for libel." (Per Pigott, C. B., in *Kennedy* v. *Hilliard*, 10 Ir. C. L. Rep. at p. 209, cited with approval by Brett, M. R., in *Munster* v. *Lamb* (C. A.), 11 Q. B. D. at pp. 604, 605.)

(i.) *Parliamentary Proceedings.*

No member of either House of Parliament is in any way responsi-

ble in a court of justice for anything said in the House. (Bill of Rights, 1 Will. & Mary, st. 2, c. 2.) And no indictment will lie for an alleged conspiracy by members of either House to make speeches defamatory of the plaintiff. (*Ex parte Wason*, L. R. 4 Q. B. 573; 38 L. J. Q. B. 302; 40 L. J. (M. C.) 168; 17 W. R. 881.)

But this privilege does not extend outside the walls of the House.

Hence at common law, even if the whole House ordered the publication of parliamentary reports and papers, no privilege attached. (*R.* v. *Williams* (1686), 2 Shower, 471; Comb. 18 (see, however, the comments on this case in *R.* v. *Wright* (1799), 8 T. R. 293); *Stockdale* v. *Hansard* (1839), 2 Moo. & Rob. 9; 7 C. & P. 731; 9 A. & E. 1—243; 2 P. & D. 1; 3 Jur. 905; 8 Dowl. 148, 522.) But now, by stat. 3 & 4 Vict. c. 9, all reports, papers, [* 186] votes and proceedings ordered to be published by either House of Parliament, are made absolutely privileged, and all proceedings at law, civil or criminal, will be stayed at once on the production of a certificate that they were published by order of either House. (See the Act in Appendix.) The only case under the Act is the second case of *Stockdale* v. *Hansard* (1840), 11 A. & E. 253, 297.

A petition to Parliament is absolutely privileged, although it contain false and defamatory statements. (*Lake* v. *King*, 1 Saund. 131; 1 Lev. 240; 1 Mod. 58; Sid. 414.) So is a petition to a committee of either House. (See *Kane* v. *Mulvany*, Ir. R. 2 C. L. 402.) But a publication of such a petition to others not members of the House is of course not privileged.

Illustrations.

If a member of either House of Parliament publishes to the world the speech he delivered in his place in the House, he will be liable to an action as any private individual would be.

R. v. *Lord Abingdon*, 1 Esp. 226.
R. v. *Creevey*, 1 M. & S. 273.

Though if a member of the House of Commons merely printed his speech for private circulation among his constituents, it will be conditionally privileged, *i. e.* if there be no malicious intent to injure the plaintiff.

Per Lord Campbell in *Davison* v. *Duncan*, 7 E. & B. 233; 26 L. J. Q. B. 107.

Per Cockburn, C. J., in *Wason* v. *Walter*, L. R. 4 Q. B. 95; 8 B. & S. 730; 38 L. J. Q. B. 42; 17 W. R. 169; 19 L. T. 416.

Evidence given before a Select Committee of the House of Commons is privileged.

Goffin v. *Donnelly*, 6 Q. B. D. 307; 50 L. J. Q. B. 303; 29 W. R. 440; 44 L. T. 141; 45 J. P. 439.

But a letter written to the Privy Council, touching the conduct of one of their officers, is not absolutely privileged; it is open to the plaintiff to prove express malice if he can.

Proctor v. *Webster*, 16 Q. B. D. 112; 55 L. J. Q. B. 150; 53 L. T. 765.

Reports in the newspapers of parliamentary proceedings are conditionally, not absolutely, privileged.

See *post*, pp. 263—5.

[*187] (ii.) *Judicial Proceedings.*

No action will lie for defamatory statements made or sworn in

the course of a judicial proceeding before any court of competent jurisdiction. Everything that a judge says on the bench, or a witness in the box, or counsel in arguing, is absolutely privileged, so long as it is in any way connected with the inquiry. So are all documents necessary to the conduct of the cause, such as pleadings, affidavits, and instructions to counsel. This immunity rests on obvious grounds of public policy and convenience.

Judges.

A judge of a superior Court has an absolute immunity, and no action can be maintained against him, even though it be alleged that he spoke maliciously, knowing his words to be false, and also that his words were irrelevant to the matter in issue before him, and wholly unwarranted by the evidence. It is essential to the highest interests of public policy to secure the free and fearless discharge of high judicial functions. (*Floyd* v. *Barker*, 12 Rep. 24.)

The judge of an inferior court of record enjoys the same immunity in this respect as the judge of a superior Court, so long as he has jurisdiction over the matter before him. For any act done in any proceeding in which he either knows, or ought to know, that he is without jurisdiction, he is liable as an ordinary subject. (*Houlden* v. *Smith*, 14 Q. B. 841; *Calder* v. *Halket*, 3 Moo. P. C. C. 28.) And so he would be for words spoken after the business of the court is over. (*Paris* v. *Levy*, 9 C. B. N. S. 342; 30 L. J. C. P. 22; 7 Jur. N. S. 289; 9 W. R. 71; 3 L. T. 324.) A justice of the peace enjoys an equal immunity. An action will lie against him for defamatory words spoken [*188] maliciously and without reasonable or probable cause if they do not arise out of any matter properly before him. (See *Kirby* v. *Simpson*, 10 Exch. 358; *Gelen* v. *Hall*, 2 H. & N. 379.) But if the conduct of the plaintiff be a matter in any way relevant to the inquiry, and the proceedings are within the jurisdiction of the magistrate, he may express his opinion of such conduct with the utmost freedom, and no action will lie. The *dicta* of Lord Denman, C. J., in *Kendillon* v. *Maltby*, Car. & M. 402; 2 Moo. & Rob. 438, implying that an action would lie against a magistrate for words uttered in the course of his duty, on proof both of malice and of the absence of all reasonable and probable cause, are expressly overruled by the Court of Appeal in *Munster* v. *Lamb*, 11 Q. B. D. 608; 52 L. J. Q. B. 726; 32 W. R. 243; 49 L. T. 252; 47 J. P. 805.

Illustrations.

No action will lie against a judge of one of the superior Courts for any judicial act, though it be alleged to have been done maliciously and corruptly.

Fray v. *Blackburn*, 3 B. & S. 576.
See *Floyd* v. *Barker*. 12 Rep. 24.
Groenvelt v. *Burwell*, 1 Ld. Raym. 454, 468; 12 Mod. 388.
Dicas v. *Lord Brougham*, 6 C. & P. 249; 1 M. & R. 309.
Taaffe v. *Downes*, 3 Moo. P. C. C. 36, n.
Kemp v. *Neville*, 10 C. B. N. S. 523; 31 L. J. C. P. 158; 4 L. T. 640.

No action lies against a judge for unjustly censuring and denouncing a counsel then engaged in the cause before him, even although it be alleged that it was done from motives of private malice.

Miller v. *Hope*, 2 Shaw, Sc. App. Cas. 125.

A County Court judge, while sitting in Court and trying an action in which the plaintiff was defendant, said to him: "You are a harpy, preying on the vitals of the poor." The plaintiff was an accountant and scrivener. *Held*, that no action lay for words so spoken by the defendant in his capacity as County Court judge, although they were alleged to have been spoken falsely and maliciously, and without any reasonable or probable cause or any foundation whatever, and to have been wholly irrelevant to the case before him.

Scott v. *Stansfield*, L. R. 3 Ex. 220; 37 L. J. Ex. 155; 16 W. R. 911; 18 L. T. 572.

No action lies against a coroner for anything he says in his address to the jury impanelled before him, however defamatory, false, or malicious it may be; unless the plaintiff can prove that the statement was wholly irrelevant to the [*189] inquisition, and not warranted by the occasion, the coroner's court being "a court of record of very high authority."

Thomas v. *Churton*, 2 B. & S. 475; 31 L. J. Q. B. 139; 8 Jur. N. S. 795.

See also *Yates* v. *Lansing*, 5 Johns. 283; 9 Johns. 395 (American).

A chairman of quarter sessions may denounce the grand jury as a "seditious, scandalous, corrupt, and perjured jury."

R. v. *Skinner*, Lofft, 55.

The judgment of a court-martial, containing defamatory matter, is absolutely privileged, though it is not a court of record.

Jekyll v. *Sir John Moore*, 2 B. & P. N. R. 341; 6 Esp. 63.

Home v. *Bentinck*, 2 B. & B. 130; 4 Moore, 563.

Oliver v. *Bentinck*, 3 Taunt. 456.

A magistrate commented severely on the conduct of a policeman which came under his judicial notice, and in consequence the policeman was dismissed from the force. *Held*, that no action lay.

Kendillon v. *Maltby*, 2 M. & Rob. 438; Car. & Mar. 402.

See also *Allardice* v. *Robertson*, 1 Dow, N. S. 514; 1 Dow & Clark, 495; 6 Shaw & Dun. 242; 7 Shaw & Dun. 691; 4 Wil. & Shaw, App. Cas. 102.

Pratt v. *Gardner*, 2 Cushing (Massachusetts), 63.

But a magistrate's clerk has no right to make any observation on the conduct of the parties before the Court; and no such observation will be privileged.

Delegal v. *Highley*, 3 Bing. N. C. 950; 5 Scott, 154; 3 Hodges, 158; 8 C. & P. 444.

Counsel, &c.

No action will lie against a barrister for defamatory words spoken as counsel in the course of any judicial proceeding with reference thereto, even though they were unnecessary to support the case of his client, and were uttered without any justification or excuse, and from personal ill-will or anger towards the plaintiff arising from some previously existing cause, and are irrelevant to every question of fact which is in issue before the tribunal. (*Munster* v. *Lamb* (C. A.), 11 Q. B. D. 588; 52 L. J. Q. B. 726; 32 W. R. 243; 49 L. T. 252; 47 J. P. 805.)

This decision gives to an advocate the same absolute immunity as is enjoyed by a judge of a Superior Court. The previous cases had not gone so far. In *Brook* v. *Sir Henry Montague* (1606), Cro. Jac. 90, the Court decided that "counsel in law retained hath a privilege to enforce anything which is informed him by his client, and to give it in evidence, being pertinent to the matter in question, and not to [*190] examine whether it be true or false; but it is at the peril of him who informs him." But in *Wood* v. *Gun-*

ston, Styles, 462, Glyn, C. J., says, "It is the duty of a counsellor to speak for his client, and it shall be intended to be spoken according to his client's instructions." And in *Flint* v. *Pike*, 4 B. & C. 473, Bayley, J., says, "The law presumes that he acts in discharge of his duty, and in pursuance of his instructions." And in *Butt, Q. C.* v. *Jackson*, 10 Ir. L. R. 120, the Court expressly decided that instructions to counsel are not the test by which to try whether or not the line of duty has been passed. Hence the words are still absolutely privileged, although counsel may have exceeded his instructions. (See also *Hodgson* v. *Scarlett*, 1 B. & Ald. 232 ; Holt, N. P. 621 ; *Needham* v. *Dowling*, 15 L. J. C. P. 9 ; *R. pros. Armstrong, Q. C.* v. *Kiernan*, 7 Cox, C. C. 6 ; 5 Ir. C. L. R. 171 ; and *Taylor* v. *Swinton* (1824), 2 Shaw's Scotch App. Cas. 245.) But the recent decision of the Court of Appeal removes all limitations whatever on the absolute privilege of an advocate for all words uttered in the course of his duty. The rule is made so wide (as Brett, M. R., points out, 11 Q. B. D. 604), not to protect counsel who deliberately and maliciously slander others, but in order that innocent counsel who act *bonâ fide* may not be "unrighteously harassed with suits."

An attorney acting as an advocate in a county court or a police court enjoys the same immunity as counsel. (*Mackay* v. *Ford*, 5 H. & N. 792 ; 29 L. J. Ex. 404 ; 6 Jur. N. S. 587 ; 6 W. R. 586 ; *Munster* v. *Lamb, ubi supra.*) So with a proctor in an ecclesiastical court. (*Higginson* v. *Flaherty*, 4 Ir. C. L. R. 125.) The party himself, because of his ignorance of the proper mode of conducting a case, is allowed even greater latitude. (Per Holroyd, J., in *Hodgson* v. *Scarlett*, 1 B. & Ald. 244.) Any observation made by one of the jury during the trial is equally privileged, provided it is pertinent to the inquiry. (*R.* v. *Skinner*, Lofft, 55.) And so is any presentment by a grand jury. (*Little* v. *Pomeroy*, Ir. R. 7 C. L. 50.)

Witnesses.

A witness in the box is absolutely privileged in answering all the questions asked him by the counsel on either side ; [*191] and even if he volunteers an observation (a practice much to be discouraged), still if it has reference to the matter in issue, or fairly arises out of any question asked him by counsel, though only going to his credit, such observation will also be privileged. (*Seaman* v. *Netherclift*, 1 C. P. D. 540 ; 2 C. P. D. 53 ; 46 L. J. C. P. 128.) But a remark made by a witness in the box, wholly irrelevant to the matter of inquiry, uncalled for by any question of counsel, and introduced by the witness maliciously for his own purposes, would not be privileged, and would also probably be a contempt of court. So, of course, an observation made by a witness while waiting about the Court, before or after he has given his evidence, is not privileged. (*Trotman* v. *Dunn*, 4 Camp. 211 ; *Lynam* v. *Gowing*, 6 L. R. Ir. 259.) Nor is a private letter written to the judge to

influence his decision. (*Gould* v. *Hume*, 3 C. & P. 625.) Such a letter is strictly a contempt of court.

Affidavits, Pleadings, &c.

Every affidavit sworn in the course of a judicial proceeding before a court of competent jurisdiction is absolutely privileged, and no action lies therefor, however false and malicious may be the statements made therein. (*Revis* v. *Smith*, 18 C. B. 126; 25 L. J. C. P. 195; *Henderson* v. *Broomhead*, 4 H. & N. 569; 28 L. J. Ex. 360; 5 Jur. N. S. 1175.) So is any indorsement on a writ. (*Lord Beauchamps* v. *Sir R. Croft*, Dyer, 285 a.) So are all pleadings and instructions to counsel. (See *Bank of British North America* v. *Strong*, 1 App. Cas. 307; 34 L. T. 627.) So are articles of the peace exhibited against the plaintiff. (*Cutler* v. *Dixon*, 4 Rep. 14.) The only exception is where an affidavit is sworn recklessly and maliciously before a Court that has no jurisdiction in the matter, and no power to entertain the proceeding. (*Buckley* v. *Wood*, 4 Rep. 14; Cro. Eliz. 230; *R.* v. [*192] *Salisbury*, 1 Ld. Raym. 341; *Lewis* v. *Levy*, E. B. & E. 554; 27 L. J. Q. B. 282; 4 Jur. N. S. 970.) In all other cases the plaintiff's only remedy is to indict the deponent for perjury, if he dare. (*Doyle* v. *O'Doherty*, Car. & M. 418; *Astley* v. *Younge*, 2 Burr. 807.) The Court will, however, sometimes order scandalous matter in such an affidavit to be expunged. (*Christie* v. *Christie*, L. R. 8 Ch. 499; 42 L. J. Ch. 544; 21 W. R. 493; 28 L. T. 607.) But, even for matter thus expunged, no action can be brought. (*Kennedy* v. *Hilliard*, 10 Ir. C. L. R. 195; 1 L. T. 578.)

In short, "neither party, witness, counsel, jury or judge can be put to answer civilly or criminally for *words spoken in office*." (Per Lord Mansfield in *R.* v. *Skinner*, Lofft, 56.)

Illustrations.

A woman was charged before a court of petty sessions with administering drugs to the inmates of the plaintiff's house in order to facilitate the commission of a burglary there. The plaintiff was the prosecutor, and the defendant, who was a solicitor, appeared for the defence of the woman. It was admitted that she had been at the plaintiff's house on the evening before the burglary; and there was some evidence, though very slight, that a narcotic drug had been administered to the inmates of the plaintiff's house on that evening. During the proceedings before the magistrates the defendant, acting as advocate for the woman, suggested that the plaintiff might be keeping drugs at his house for immoral or criminal purposes. There was no evidence called or tendered that the plaintiff kept any drugs in his house at all. *Held*, that no action would lie against the defendant for these words.

Munster v. *Lamb* (C. A.), 11 Q. B. D. 588; 52 L. J. Q. B. 726; 32 W. R. 243; 49 L. T. 252; 47 J. P. 805.

Defendant, an expert in handwriting, gave evidence in the Probate Court in the trial of *Davies* v. *May*, that, in his opinion, the signature to the will in question was a forgery. The jury found in favour of the will, and the presiding judge made some very disparaging remarks on defendant's evidence. Soon afterwards defendant was called as a witness in favour of the genuineness of another document, on a charge of forgery before a magistrate. In cross-examination he was asked whether he had given evidence in the suit of *Davies*

v. *May*, and whether he had read the judge's remarks on his evidence. He answered, "Yes." Counsel asked no more questions, and defendant insisted on adding, though told by the magistrate not to make any further statement as to *Davies* v. *May*: "I believe that will to be a rank forgery, and shall believe so to the day of my death." An action of slander for these words having been brought by one of the attesting witnesses to the will: *held*, that the words were [*193] spoken by defendant as a witness, and had reference to the inquiry before the magistrate, as they intended to justify the defendant, whose credit as a witness had been impugned; and the defendant was therefore absolutely privileged.

Seaman v. *Netherclift*, 1 C. P. D. 540; 45 L. J. C. P. 798; 24 W. R. 884; 34 L. T. 878; (C. A.) 2 C. P. D. 53; 46 L. J. C. P. 128; 25 W. R. 159; 35 L. T. 784.

A servant summoned his master before a court of conscience for a week's wages. The master said: "He has been transported before, and ought to be transported again. He has been robbing me of nine quartern loaves a week." Lord Ellenborough held the remark absolutely privileged, if the master spoke them in opening his defence to the Court; but otherwise if he spoke them while waiting about the room and not for the purpose of his defence.

Trotman v. *Dunn*, 4 Camp. 221. [N. B.—The latter part of the headnote to this case is misleading.]

Plaintiff made an affidavit in an action he had brought against defendant in the King's Bench. Defendant (apparently conducting his own case) said in court, in answer to this affidavit, "It is a false affidavit, and forty witnesses will swear to the contrary." *Held*, that no action lay for these words.

Boulton v. *Chapman* (1640), Sir W. Jones, 431; March, 20, pl. 45.

A charge of felony made by the defendant when applying in due course to a justice of the peace for a warrant to apprehend the plaintiff on that charge is absolutely privileged.

Ram v. *Lamley*, Hutt. 113.
See *Johnson* v. *Evans*, 3 Esp. 32.
Weston v. *Dobniet*, Cro. Jac. 432.
Dancaster v. *Hewson*, 2 Man. & R. 176.

Defamatory communications made by witnesses or officials to a court-martial, or to a court of inquiry instituted under articles of war, are absolutely privileged.

Keighley v. *Bell*, 4 F. & F. 763.
Dawkins v. *Lord Rokeby*, L. R. 8 Q. B. 255; 42 L. J. Q. B. 633; 21 W. R. 544; 4 F. & F. 806; 28 L. T. 134; L. R. 7 H. L. 744; 45 L. J. Q. B. 8; 23 W. R. 931; 33 L. T. 196.

No action lay for defamatory expressions contained in a bill in Chancery.

Hare v. *Mellers*, 3 Leon. 138; as explained by Pollock, B., 16 Q. B. D. at p. 113.

No action will lie for defamatory expressions against a third party, contained in an affidavit made and used in the proceedings in a cause, though such statements be false, to the knowledge of the party making them, and introduced out of malice.

Henderson v. *Broomhead*, 28 L. J. Ex. 360; 4 H. & N. 569; 5 Jur. N. S. 1175.
Astley v. *Younge*, 2 Burr. 807: 2 Ld. Kenyon, 536.
Revis v. *Smith*, 18 C. B. 126; 25 L. J. C. P. 195; 2 Jur. N. S. 614
Hartsock v. *Reddick*, 6 Blackf. (Indiana), 255.

If application be *bonâ fide* made to a court which the defendant by a pardonable error honestly believes to have a jurisdiction which it has not, the privilege will not be lost merely by reason of this error.

Buckley v. *Wood*, 4 Rep. 14; Cro. Eliz. 230.
M'Gregor v. *Thwaites*, 3 B. & C. 24; 4 D. & R. 695.
Thorn v. *Blanchard*, 5 Johns. 508.

[*194] But in other cases an affidavit made voluntarily when no cause is pending, or made *coram non judice*, is not privileged as a judicial proceeding.

Maloney v. *Bartley*, 3 Camp. 210.

An attorney's bill of of costs is in no sense a judicial proceeding, though delivered under a judge's order, and can claim no privilege.

Bruton v. *Downes*, 1 F. & F. 668.

Reports of judicial proceedings are not *absolutely* privileged, however fair and accurate they may be; the plaintiff may still prove that the reporter acted maliciously in sending the report to the newspaper.

Stevens v. *Sampson*, 5 Ex. D. 53; 49 L. J. Q. B. 120; 28 W. R. 87; 41 L. T. 782.

Salmon v. *Isaac*, 20 L. T. 885.

(iii.) *Naval and Military affairs, &c.*

A similar immunity, resting also on obvious grounds of public policy, is accorded to all reports made by a military officer to his military superiors in the course of his duty, and to evidence given by any military man to a court martial or other military court of inquiry; it being essential to the welfare and safety of the State that military discipline should be maintained without any interference by civil tribunals. In short, "all acts done in the honest exercise of military authority are privileged." The law is, of course, the same as to the navy. Naval and military matters are for naval and military tribunals to determine, and not the ordinary civil courts. (*Hart* v. *Gumpach*, L. R. 4 P. C. 439; 9 Moore P. C. C. N. S. 241; 42 L. J. P. C. 25; 21 W. R. 365; *Dawkins* v. *Lord Paulet*, L. R. 5 Q. B. 94; 39 L. J. Q. B. 53; 18 W. R. 336; 21 L. T. 584; *Dawkins* v. *Lord Rokeby*, L. R. 7 H. L. 744; 45 L. J. Q. B. 8; 23 W. R. 931; 33 L. T. 196; 4 F. & F. 806.) A similarly absolute privilege extends to all acts of State, and to the official notification thereof in the *London Gazette*, to all State papers, and to all advice given to the Crown by its ministers.

Illustrations.

A military court of inquiry may not be strictly a judicial tribunal, but where such court has been assembled under the orders of the General Commanding-
[* 195] in-Chief in conformity with the Queen's Regulations for the government of the army, a witness who gives evidence thereat stands in the same situation as a witness giving evidence before a judicial tribunal, and all statements made by him thereat, whether orally or in writing, having reference to the subject of the inquiry, are absolutely privileged.

Dawkins v. *Lord Rokeby*, L. R. 7 H. L. 744; 45 L. J. Q. B. 8; 23 W. R. 931; 33 L. T. 196; in the Exch. Ch. L. R. 8 Q. B. 255.

Goffin v. *Donnelly*, 6 Q. B. D. 307; 50 L. J. Q. B. 303; 29 W. R. 440; 44 L. T. 141; 45 J. P. 439.

And see *Keighley* v. *Bell*, 4 F. & F. 763.

Home v. *Bentinck*, 2 B. & B. 130; 4 Moore, 563.

The defendant, being the plaintiff's superior officer, in the course of his military duty forwarded to the Adjutant-General certain letters written by the plaintiff, and at the same time, also in accordance with his military duty, reported to the Commander-in-Chief on the contents of such letters, using words defamatory of the plaintiff. It was alleged that the defendant did so maliciously, and without any reasonable, probable, or justifiable cause, and not in the *bonâ fide* discharge of his duty as the plaintiff's superior officer. *Held*, on demurrer, by the majority of the Court of Q. B. (Mellor and Lush, JJ.), that such reports being made in the course of military duty were absolutely privileged, and that the civil courts had no jurisdiction over such purely military matters. Cockburn, C. J., dissented on the grounds that it never could be the duty of a military officer falsely, maliciously, and without reasonable and probable cause to libel his fellow-officer, that the courts of common law have

jurisdiction over all wilful and unjust abuse of military authority, and that it would not in any way be destructive of military discipline or of the efficiency of the army to submit questions of malicious oppression to the opinion of a jury.

Dawkins v. *Lord Paulet*, L. R. 5 Q. B. 94 ; 39 L. J. Q. B. 53 ; 18 W. R. 336 ; 21 L. T. 584.

[N. B.—There was no appeal in this case. The arguments of Cockburn, C. J., deserve the most careful attention. In *Dawkins* v. *Lord Rokeby*, *supra*, the decision of the House of Lords turned entirely on the fact that the defendant was a witness. Neither Kelly, C. B., nor any of the Law Lords (except perhaps Lord Penzance), rest their judgment on the incompetency of a court of common law to enquire into purely military matters. The Court of Exchequer Chamber no doubt express an opinion that "questions of military discipline and military duty alone are cognisable only by a military court, and not by a court of law." (L. R. 8 Q. B. 271.) But after referring to "the eloquent and powerful reasoning of L. C. J. Cockburn in *Dawkins* v. *Lord E. Paulet*," the Court goes on to express its satisfaction that the question "is yet open to final consideration before a court of the last resort." However, in a court of first instance, at all events, it must now be taken to be the law that the civil courts of common law can take no cognisance of *purely* military or *purely* naval matters (*Sutton* v. *Johnstone* (1785), 1 T. R. 493 ; *Grant* v. *Gould* (1792), 2 Hen. Bl. 69 ; *Barwis* v. *Keppel* (1766), 2 Wils. 314) ; but wherever the *civil* rights of a person in the military or naval service are affected by any alleged oppression or injustice at the hands of his superior officers or any illegal action on the part of a military or naval tribunal, there the civil courts may interfere. *Re Mansergh*, 1 B. & S. 400 ; 30 L. J. Q. B. 296 ; *Warden* v. *Bailey*, 4 Taunt. 67.]

[*196] But *private letters* written by the commanding officer of the regiment to his immediate superior on military matters, as distinct from his official reports, are *not* absolutely privileged ; but the question of malice should be left to the jury.

Dickson v. *Earl of Wilton*, 1 F. & F. 419.

Dickson v. *Cambermere*, 3 F.& F. 527.

[N. B.—If this be not the distinction, these cases must be taken to be overruled by the cases cited above. See L. R. 8 Q. B. 272-3.]

By a general order it was declared that all unemployed Indian officers ineligible for public employment by reason of misconduct or physical or mental inefficiency should be removed to the pension list. Under this order the plaintiff was removed to the pension list and a notification of such removal was published in the *Indian Gazette*. *Held*, on demurrer, that no action lay either for the removal of the plaintiff, or for the official publication of the fact : although special damage was alleged.

Grant v. *Secretary of State for India*, 2 C. P. D. 445 ; 25 W. R. 848 ; 37 L. T. 188.

See *Doss* v. *Secretary of State for India in Council*, L. R. 19 Eq. 509; 23 W. R. 773 ; 32 L. T. 294.

And *Oliver* v. *Lord Wm. Bentinck*, 3 Taunt. 456.

[*197]

PART II.

QUALIFIED PRIVILEGE.

Cases of qualified privilege may be grouped under three heads :

I. Where circumstances cast upon the defendant the duty of making a communication to a certain other person, to whom he makes such communication in the *bonâ fide* performance of such duty.
II. Where the defendant has an interest in the subject matter of the communication, and the person to whom he communicates it has a corresponding interest.
III. Fair and impartial reports of the proceedings of any Court of Justice or of Parliament.

In all these instances, if the communication has been made fairly, impartially, without exaggeration or the introduction of irrelevant calumniatory matter, the communication is held privileged. But it must be remembered that although the occasion may be privileged, it is not *every* communication made on such occasion that is privileged. "It is not enough to have an interest or duty in making *a* communication ; the interest or duty must be shown to exist in making *the* communication complained of." (Per Dowse, B., 6 L. R. Ir. at p. 269.) A communication which goes beyond the occasion "exceeds the privilege."

[*198] The first two classes are often stated as one, and cases may frequently occur, which may seem to fall in either or both of them. But the distinction which I propose to draw between them is this :—

In the first class of cases, the defendant makes the communication, perhaps to an entire stranger, generally to one with whom he has had no previous concern ; and he does so because he feels it to be his duty so to do. The person to whom he makes the communication is under no corresponding obligation ; and generally has no common interest with the defendant in the matter. The defendant's duty would be the same to whomsoever the communication had to be made.

In the second class of cases, however, there must have been an intimate relation or connexion already established between the defendant and the person to whom he makes the communication, and it is because of this relationship that the communication is privileged. The same words, if uttered to another person with whom the defendant had no such connexion, would not be privileged.

The third class of cases might be included in either of the two preceding, for it is the duty of a newspaper reporter to present to the public fair and impartial reports of such proceedings, while on the other hand, as one of the public, he has a common interest with the public in ensuring that such proceedings should be reported with accuracy and uniformity.

Bonâ fide comments on matters of public interest, which are sometimes treated as a fourth class of privileged communications, have been dealt with under the head of Defamatory Words, c. II., *ante*, pp. 32—52.

[* 199]

1. WHERE CIRCUMSTANCES EXIST, OR ARE REASONABLY BELIEVED BY THE DEFENDANT TO EXIST, WHICH CAST UPON HIM THE DUTY OF MAKING A COMMUNICATION TO A CERTAIN OTHER PERSON, TO WHOM HE MAKES SUCH COMMUNICATION IN THE BONA FIDE PERFORMANCE OF SUCH DUTY.

The duty may either be one which the defendant owes to society or one which he owes to his family or to himself. It will be convenient therefore to treat these cases in the following order :—

A. Communications made in pursuance of a duty owned to society.

(i) Characters of servants.
(ii) Other confidential communications of a private nature.
(iii) Information as to crime or misconduct of others : Charges against Public Officials.

B. Communications made in self-defence.

(iv) Statements necessary to protect the defendant's private interests.
(v) Statements provoked or invited by previous words or acts of the plaintiff.

In all these cases the duty referred to need not be one binding at law : any "moral or social duty of imperfect obligation" will be sufficient. (Per Lord Campbell in *Harrison* v. *Bush*, 5 E. & B. 344 ; 25 L. J. Q. B. 25.) And it is sufficient that the defendant should honestly believe that he has a duty to perform in the matter, although it may turn out that the circumstances were not such as he reasonably concluded them to be. (*Whiteley* v. *Adams*, 15 C. B. N. S. 392; 33 L. J. C. P. 89; 12 W. R. 153 ; 9 L. T.[*200] 483; 10 Jur. N. S. 470.) It is a question of *bona fides* ; in determining which the Court will look at the circumstances as they presented themselves to the mind of the defendant at the time of publication ; supposing of course that he is guilty of no laches, and does not wilfully shut his eyes to any source of information. If indeed there were means at hand for ascertaining the truth of the matter, of which the defendant neglects to avail himself and chooses rather to remain in ignorance when he might have obtained full information, there will be no pretence for any claim of privilege.

Above all, the defendant must, at the date of the communication, implicitly believe in its truth. If a man knowingly makes a false charge against his neighbour, he cannot claim privilege. It never can be his duty to circulate lies.

"For, to entitle matter, otherwise libellous, to the protection which attaches to communications made in the fulfilment of a duty, *bonâ fides*, or, to use our own equivalent, honesty of purpose, is essential ; and to this, again, two things are necessary—1, that the communication be made not merely in the course of duty, that is, on an occasion which would justify the making it, but also from a

sense of duty ; 2, that it be made with a belief of its truth." (Per Cockburn, C. J., in *Dawkins* v. *Lord Paulet*, L. R. 5 Q. B. at p. 102.)

And even where the defendant, acting under a strong sense of duty, makes a communication which he reasonably believes to be true, still he must be careful not to be led away by his honest indignation into exaggerated or unwarrantable expressions. For the privilege extends to nothing which is not justified by the occasion. Thus a letter may be privileged as to one part and not as to the rest. (*Warren* v. *Warren*, 1 C. M. & R. 251 ; 4 Tyr. 850 ; *Huntley* v. *Ward*, 6 C. B. N. S. 514 ; 1 F. & F. 552 ; 6 Jur. N. S. 18 ; *Simmonds* v. *Dunne*, Ir. R. 5 C. L. 358.)

And even where the expressions employed are [*201] allowable in all respects, still the mode of publication may take them out of the privilege. Confidential communications should not be shouted across the street for all passers-by to hear. Nor should they be committed to a postcard or a telegram, which others will read. They should be sent in a letter properly sealed and fastened. If the words be spoken, the defendant must be careful in whose presence he speaks. He should choose a time when no one else is by except those to whom it is his duty to make the statement. It is true that the accidental presence of some third person, unsought by the defendant, will not take the case out of the privilege ; but it would be otherwise if the defendant purposely sought an opportunity of making a communication *primâ facie* privileged in the presence of the very persons who were most likely to act upon it to the prejudice of the plaintiff. (See *post*, c. IX. Malice.)

A. Communications made in pursuance of a duty owed to society.

(i.) *Characters of Servants.*

The instance that occurs most frequently in ordinary life of this first class of privileged communications is where the defendant is asked as to the character of his former servant, by one to whom he or she has applied for a situation. A duty is thereby cast upon the former master to state fully and honestly all that he knows either for or against the servant; and any communication, made in the performance of this duty, is clearly privileged for the sake of the common convenience of society, even though it should turn out that the former master was mistaken in some of his statements. But if the master, knowing that the servant deserves a good character, yet having some grudge against him, or from some other malicious motive, deliberately states [*202] what he knows to be false, and gives his late servant a bad character, then such a communication is not a performance of the duty, and therefore is not privileged. There is, in fact, in such a case, evidence of malice which "takes the case out of the privilege."

No one is bound to give a character to his servant when asked for

it. (*Carrol* v. *Bird*, 3 Esp. 201.) The old statute 5 Eliz. c. 4, which required a master in certain cases to satisfy two justices of the peace that he had reasonable and sufficient cause for putting away his servant, has long been obsolete, and now is wholly repealed by the 38 & 39 Vict. c. 86, s. 17. But if any character is given, it must be one fully warranted by the facts, and not prompted by unworthy motives.

If, after a favourable character has been given, facts come to the knowledge of the former master which induce him to alter his opinion, it is his duty to inform the person to whom he gave the character of his altered opinion. Hence a letter written to retract a favourable character previously given will also be privileged. (*Gardner* v. *Slade*, 13 Q. B. 796 ; 18 L. J. Q. B. 334 ; 13 Jur. 826 ; *Child* v. *Affleck and wife*, 9 B. & C. 403 ; 4 M. & R. 338.)

So, again, if I take a servant with a character given her by B., and am sadly disappointed in her, I may write and inform B. that she does not deserve the character he gave her, so that he may refrain from recommending her to others ; and such a letter would be privileged. (*Dixon* v. *Parsons*, 1 F. & F. 24.) But see the dicta in *Fryer* v. *Kinnersley*, 15 C. B. N. S. 429 ; 33 L. J. C. P. 96 ; 10 Jur. N. S. 441. A master may also warn his present servants against associating with a former servant whom he has discharged, and state his reasons for dismissing him. (*Somerville* v. *Hawkins*, 10 C. B. 590 ; 20 L. J. C. P. 131 ; 15 Jur. 450.)

But if I happen to hear that a discharged servant of mine is about to enter the service of B., it may be questioned whether it is my duty to write off at once and inform B. of [*203] the servant's misconduct. It is certainly safer to wait till B. applies to me for the servant's character. Eagerness to prevent a former servant obtaining another place has the appearance of malice, and if it were found that I wrote systematically to every one to whom the plaintiff applied for work, the jury would probably give damages against me. On the other hand, if B. was an intimate friend or a relation of mine, and there was no other evidence of malice except that I *volunteered* the information, the occasion would still be privileged. In short, when a master "volunteers to give the character, stronger evidence will be required that he acted *bonâ fide*, than in the case where he has given the character after being required so to do." (Per Littledale, J., in *Pattison* v. *Jones*, 8 B. & Cr. p. 586 ; 3 C. & P. p. 387.)

Illustrations.

After a mercantile firm has given to one of its clerks a general recommendation by means of which he obtains a situation, if a partner subsequently discovers facts which alter his opinion of that clerk's character, it is his duty to communicate the new facts and his change of opinion to the new employer of that clerk, in order to guard against his being misled by the previous recommendation of the firm.

Fowles v. *Bowen*, 3 Tiffany (30 N. Y. R.), 20.

Sir Gervas Clifton never made any complaint of his butler's conduct while he was with him ; but he suddenly dismissed him without notice and without a month's wages. The butler (naturally, but illegally) refused to leave the house without a month's wages ; a violent altercation took place, and eventually a

policeman was sent for who forcibly ejected the butler. Sir Gervas subsequently gave the butler a very bad character, in too strong terms, and making some charges against him which were wholly unfounded. Verdict for the plaintiff. Damages £20. New trial refused.

Rogers v. *Clifton*, 3 B. & P. 587.

Murdoch v. *Funduklian*, 2 Times L. R. 215, 614.

The defendant on being applied to for the character of the plaintiff, who had been his saleswoman, charged her with theft. He had never made such a charge against her till then: he told her that he would say nothing about it if she resumed her employment at his house; subsequently he said that if she would acknowledge the theft he would give her a character. *Held*, that there was abundant evidence that the charge of theft was made *malâ fide*, with the intention of compelling plaintiff to return to defendant's service. Damages, £60.

Jackson v. *Hopperton*, 16 C. B. N. S. 829; 12 W. R. 913; 10 L. T. 529.

*204] [If a master about to dismiss his servant for dishonesty calls in a friend to hear what passes, the presence of such third person does not take away privilege from words which the master then uses, imputing dishonesty.

Taylor v. *Hawkins*, 16 Q. B. 308; 20 L. J. Q. B. 313; 15 Jur. 746.

Jones v. *Thomas*, 34 W. R. 104; 53 L. T. 678; 50 J. P. 149.

Where a master discharged his footman and cook, and they asked him his reason for doing so, and he told the footman, in the absence of the cook, that "he and the cook had been robbing him;" and told the cook, in the absence of the footman, that he had discharged her "because she and the footman had been robbing him:" *held*, that these were privileged communications as respected the absent parties, as well as those to whom they were respectively made.

Manby v. *Witt*, } 18 C. B. 544; 25 L. J. C. P. 294; 2 Jur. N. S.
Eastmead v. *Witt*, } 1004.

A letter written by an employer dismissing a shopwoman, and stating the reasons why in very forcible language, is a privileged communication, and the court will not closely scrutinize the language to find evidence of malice.

R. v. *Perry*, 15 Cox, C. C. 160.

(ii.) *Other communications of a private nature.*

(*a*) *Answers to confidential inquiries.*

The principles which apply to characters given to servants govern also all other answers to private and confidential inquiries.

If the owner of a vacant farm ask me as to the character of a person applying to become his tenant, my answer would be privileged. So if a friend of mine comes down into the country to live near me, and asks my advice as to the tradesman or doctor he shall employ, I may tell him my opinion of the various tradesmen or doctors in the locality without fear of an action for slander. "If a person who is thinking of dealing with another in any matter of business asks a question abut his character from some one who has means of knowledge, it is for the interests of society that the question should be answered; and if answered *bonâ fide* and without malice, the answer is a privileged communication." (Per Brett, L. J., in *Waller* v. *Loch* (C. A.), 7 Q. B. D. 622; 51 L. J. Q. B. 274; 30 W. R. 18; 45 L. T. 242.)

So, too, it is a duty every one owes to society to assist in the discovery of any crime, dishonesty, or misconduct, [*205] and to afford all information which will lead to the detection of the culprit. "It is a perfectly privileged communication if a party who is interested in discovering a wrong-doer comes and makes inquiries, and a per-

son in answer makes a discovery or a *bonâ fide* communication which he knows or believes to be true, although it may possibly affect the character of a third person." (Per Parke, B., in *Kine* v. *Sewell*, 3 M. & W. 302.)

In short, whenever in answering an inquiry the defendant is acting *bonâ fide* in the discharge of any legal, moral, or social duty, his answer will be privileged. "Every one owes it as a duty to his fellow-men to state what he knows about a person when inquiry is made." (Per Grove, J., in *Robshaw* v. *Smith*, 38 L. T. 423. And see *Lentner* v. *Merfield* (C. A.), Times for May 6th, 1880.)

And when once such a confidential inquiry is set on foot, all subsequent interviews between the parties will be privileged, so long as what takes place thereat is still relevant to the original inquiry. (*Beatson* v. *Skene*, 5 H. & N. 838; 29 L. J. Ex. 430; 6 Jur. N. S. 780; 2 L. T. 378; *Hopwood* v. *Thorn*, 8 C. B. 293; 19 L. J. C. P. 94; 14 Jur. 87; *Wallace* v. *Carroll*, 11 Ir. C. L. R. 485.)

Of course the defendant must honestly believe in the truth of the charge he makes at the time he makes it. And this implies that he must have *some* ground for the assertion: it need not be a conclusive or convincing ground: but no charge should ever be made recklessly and wantonly, even in confidence. The inquirer should be put in possession of all you know, and of your means of knowledge; if your only means of knowledge is hearsay, tell him so: do not state a rumour as a fact; and, in repeating a rumour, be careful not to heighten its colour, or exaggerate its extent. If the only information you possess is contained in a letter, it is best to give him the letter, and leave him to draw his own conclusions. (*Coxhead* v. *Richards*, 2 C. B. 569; 15 L. J. C. P. 278; 10 Jur. 984; *Robshaw* v. *Smith*, 38 L. T. 423.) Do not speak with the [* 206] air of knowing of your own knowledge that every word you say is the fact when you are merely repeating gossip or hazarding a series of reckless assertions. If time allows, and means of inquiry exist, you should make some attempt to sift the charge before you spread it. In short, confidential advice should be given seriously and conscientiously: it should be manifest that you do not take a pleasure in maligning the plaintiff, but are compelled to do so in the honest discharge of a painful duty.

And, above all, the answer must be pertinent to the inquiry. If I am asked the plaintiff's name or address, I must not commence to disparage the plaintiff's credit, conduct, family, or wares. In fact, the reply must be an answer to the question, or reasonably induced thereby, and not irrelevant information gratuitously volunteered. (*Southam* v. *Allen*, Sir T. Raym. 231; *Huntley* v. *Ward*, 6 C. B. N. S. 514.) It is for the jury in each case to determine whether what passed was or was not relevant to the inquiry, and whether or no the information was given confidentially.

Illustrations.

If a friend tells me he wants a good solicitor to act for him, and asks my opinion of Smith, I am justified in telling him all I know for or against Smith. But if a stranger asked me in the train: "Is not that gentleman a solicitor?"

I should not, it is submitted, be privileged in replying: "Yes, but he ought to have been struck off the rolls long ago."

If A. is about to have dealings with B., but first comes to C. and confidentially asks him his opinion of B., C.'s answer is privileged. "Every one is quite at liberty to state his opinion *bonâ fide* of the respectability of a party thus inquired about." Per Lord Denman in

Storey v. *Challands*, 8 C. & P. 234.

Plaintiff had been tenant to the defendant; a wine-broker went to defendant to ask him plaintiff's present address. Defendant commenced to abuse the plaintiff. The broker said: "I don't come to inquire about his character, but only for his address; I have done business with him before." But the defendant continued to denounce the plaintiff as a swindler, adding, however, "I speak in confidence." The broker thanked defendant for his remarks, and declined in future to trust the plaintiff. *Held*, that it was rightly left to the jury to say if defendant spoke *bonâ fide* or maliciously.

Picton v. *Jackman*, 4 C. & P. 257.

Southam v. *Allen*, Sir T. Raymond, 231.

[*207] Watkins met the defendant in Brecon, and addressing him said: "I hear that you say the bank of Bromage and Snead at Monmouth has stopped. Is it true?" Defendant answered, "Yes, it is. I was told so. It was so reported at Cricklewell, and nobody would take their bills, and I came to town in consequence of it myself." *Held*, that if the defendant understood Watkins to be asking for information by which to regulate his conduct, and spoke the words merely by way of honest advice, they were *primâ facie* privileged.

Bromage v. *Prosser*, 4 B. & Cr. 247; 1 C. & P. 475; 6 D. & R. 296.

The defendant was asked to sign a memorial, the object of which was to retain the plaintiff as trustee of a charity from which office he was about to be removed. The defendant refused to sign, and on being pressed for his reasons, stated them explicitly. *Held*, a privileged communication.

Corbes v. *Potts*, 34 L. J. Q. B. 247; 11 Jur. N. S. 946; 13 W. R. 858.

The plaintiff had been a Major-General commanding a corps of irregular troops during the war in the Crimea. Complaint having been made of the insubordination of the troops, the corps commanded by the plaintiff was placed under the superior command of General Vivian. The plaintiff then resigned his command, and General Vivian directed General Shirley to inquire and report on the state of the corps, and particularly referred him for information on the matter to the defendant, who was General Vivian's private secretary and civil commissioner. All communications made by the defendant to General Shirley touching the corps and the plaintiff's management of it are privileged, if the jury find that the defendant at the time honestly believed that he was acting within the scope of his duty in making them.

Beatson v. *Skene*, 5 H. & N. 838; 29 L. J. Ex. 430; 6 Jur. N. S. 780; 2 L. T. 378.

Hopwood v. *Thorn*, 8 C. B. 293; 19 L. J. C. P. 94; 14 Jur. 87.

A., B., and C. are brother officers in the same regiment. A. meets B. and says, "I have learned that C. has been guilty of an atrocious offence: I wish to consult you whether I should divulge it—whether I should speak of it to the commanding officer." Such remark and the discussion that ensued would be privileged, if *bonâ fide*. Per Pigot, C. B., in

Bell v. *Parke*, 10 Ir. C. L. R. 284. [The decision in the case turned on the language of the plea.]

The plaintiff was a London merchant who had had business relations with the London and Yorkshire Bank (Limited). The defendant, the manager of that bank, on being applied to by one Hudson for information about the plaintiff, showed Hudson an anonymous letter which the bank had received about the plaintiff, and which contained the libel in question. *Held*, that handing Hudson the letter in confidence was a privileged communication. Grove, J., in refusing a rule for a new trial made the following remarks:—"The defendant did not act as a volunteer, but was applied to for information. When applied to he did give such information as he possessed. He might have refused to give that information. He had no legal duty cast upon him to give any opinion.

But he was entitled to give his opinion when asked, and *à fortiori*, as it seems to me, to show any letters he had received bearing on the subject. If one man shows another a letter, he leaves him to estimate what value attaches to it; whereas any opinion he gives might be based on very insufficient grounds. It is better [*208] to state facts than to give an opinion. Every one owes it as a duty to his fellow-men to state what he knows about a person, when inquiry is made; otherwise no one would be able to discern honest men from dishonest men. It is highly desirable, therefore, that a privilege of this sort should be maintained. An anonymous letter is usually a very despicable thing. But anonymous letters may be very important, not by reason of what they say, but because they lead to inquiry, which may substantiate what they have said. It seems to me, therefore, that he was fully entitled to show this anonymous letter for what it was worth."

Robshaw v. *Smith*, 28 L. T. 423.

Where a father employed the defendant to make inquiries about the position and antecedents of his daughter's husband, a report by the defendant to the father of the result of his inquiries is privileged.

Atwill v. *Mackintosh*, 6 Lathrop (120 Mass.), 177.

So where an attorney employed defendant to translate some German into English, no action lies for the publication of such translation to the attorney.

Luckerman v. *Sonnenschein*, 32 Freeman (62 Illinois), 115.

And see *Kerr* v. *Shedden*, 4 C. & P. 528.

Du Barre v. *Livette*, Peake, 76.

(*b*) *Confidential communications not in answer to a previous inquiry.*

In the cases just quoted stress is laid on the fact that the defendant did not volunteer the information but was expressly applied to for it. This is always no doubt a very material fact in the defendant's favour; but it is never alone decisive. "It is not necessary in all cases that the information should be given in answer to an inquiry." (Per Jessel, M. R., in *Waller* v. *Loch* (C. A.), 7 Q. B. D. 621; 51 L. J. Q. B. 274; 45 L. T. 242.) Many occasions are privileged in which no application is made to the defendant, but he himself takes the initiative; while, on the other hand, as we have seen, many answers to inquiries will not necessarily be privileged, even if given confidentially. The question in every case is this:—Were the circumstances such that an honest man might reasonably suppose it is his duty to act as the defendant has done in this case? And the circumstances may be such that it is clearly the duty of a good citizen to go at once to the person most concerned and tell him everything, without waiting for him to come and inquire. It may well be that he has no suspicions, and [*209] never would inquire into the matter unless warned. (See *post*, pp. 214—217.)

But in cases where neither life nor property is in imminent and obvious peril, there the circumstance that the defendant was applied to for the information, and did not volunteer it, will materially affect the issue. Where the matter is not of great or immediate importance, interference on my part may be considered officious and meddlesome; although, had I been applied to, it would clearly have been my duty to give all the information in my power. An answer to a confidential inquiry may be privileged where the same information if volunteered would be actionable.

In cases then in which there can be a doubt as to the defend-

ant's duty to speak, the fact that he was applied to for the information will tell strongly in his favour. In cases where his duty to speak was clear without that, the fact that he was applied to is immaterial.

Illustrations.

Both the Marquis of Anglesey and his agent told the defendant, the tenant of Haywood Park Farm, to inform them if he saw or heard anything wrong respecting the game. The defendant heard that the gamekeeper was selling the game, and believing the fact to be so, wrote and informed the Marquis. *Held,* that the letter was privileged; but Parke, J., intimated that if the defendant had not been previously directed to communicate anything he thought going wrong, the letter would have been unauthorized and libellous.

Cockayne v. *Hodgkisson,* 5 C. & P. 543.

See *King* v. *Watts,* 8 C. & P. 615.

If a master, hearing that a discharged servant is seeking to enter M.'s service, writes to M. of his own accord to give the servant a bad character, and thus forestalls any inquiry by M.; it will at all events require stronger evidence to prove that he acted *bonâ fide* than it would had he waited for M. to write and inquire.

Pattison v. *Jones,* 8 B. & C. 578; 3 M. & R. 101.

Horsford was about to deal with the plaintiff, when he met the defendant, who said at once, without his opinion being asked at all, "If you have anything to do with Storey, you will live to repent it; he is a most unprincipled man," &c. Lord Denman directed a verdict for the plaintiff, because the defendant began by making the statement, without waiting to be asked.

Storey v. *Challands,* 8 C. & P. 234.

Nash selected plaintiff to be his attorney in an action. Defendant, apparently [*210] a total stranger, wrote to Nash to deprecate his so employing the plaintiff. This was held to be clearly *not* a confidential communication. Damages, 1*s.*

Godson v. *Home,* 1 B. & B. 7; 3 Moore, 223.

A husband asked a medical man to see his wife and ascertain her mental condition. He reported to the husband that she was insane. *Held,* a privileged communication.

Weldon v. *Winslow, Times* for March 14th to 19th, 1884.

I am not justified in standing at the door of a tradesman's shop and voluntarily defaming his character to his intending customers. But if an intending customer comes to me and inquires as to the respectability or credit of that tradesman, it it is my duty to tell him all I know.

Storey v. *Challands,* 8 C. & P. 234

At the hearing of a county court case, *Nettlefold* v. *Fulcher,* Fulcher's solicitor commented severely on the conduct of the plaintiff, Nettlefold's debt collector. Not content with that, Fulcher's solicitor sent a full report of the case to the *Marylebone Gazette,* including his remarks on the plaintiff. The jury found that this report was substantially fair and accurate, but that it was sent to the newspaper "with a certain amount of malice." The Court upheld this finding, laying especial stress upon the fact that the defendant was a volunteer, and not an ordinary reporter for that paper.

Stevens v. *Sampson,* 5 Ex. D. 53; 49 L. J. Q. B. 120; 28 W. R. 87; 41 L. T. 782.

(*c*) *Communications made in discharge of a duty arising from a confidential relationship existing between the parties.*

In what cases then will a defendant be privileged in going of his own accord to the person concerned, and giving him information which he has not asked for? This is often a difficult question to answer. But in one class of cases it is clear that it is not only excusable, but that it is imperative on the defendant so to do; and

that is where there exists between the parties such a confidential relation as to throw on the defendant the duty of protecting the interests of the persons concerned.

Such a confidential relationship exists between husband and wife, father and son, brother and sister, guardian and ward, master and servant, principal and agent, solicitor and client, partners, or even intimate friends : in short, wherever any trust or confidence is reposed by the one in the other. In other words, it will be the duty of A. to volunteer information to B., whenever B could justly [*211] reproach A. for his silence if he did not volunteer such information.

Merely labelling a letter "*Private and confidential*," or merely stating, "*I speak in confidence*," will not make a communication confidential in the legal sense of that term, if there be in fact no relationship between the parties which the law deems confidential. (*Picton* v. *Jackman*, 4 C. & P. 257.)

Thus it is clearly the duty of my steward, bailiff, foreman, or housekeeper, to whom I have entrusted the management of my lands, business, or house, to come and tell me if they think anything is going wrong, and not to wait till my own suspicions are aroused, and I myself begin asking questions. So my family solicitor may voluntarily write and inform me of anything which he thinks it is to my advantage to know, without waiting for me to come down to his office and inquire. But it would be dangerous for another solicitor, whom I had never employed, to volunteer the same information ; for till I retain him in the matter, there is no confidential relation existing between us. So a father, guardian, or an intimate friend may warn a young man against associating with a particular individual ; or may warn a lady not to marry a particular suitor ; though in the same circumstances it might be considered officious and meddlesome, if a mere stranger gave such a warning. So if the defendant is in the army or in a government office, it would be his duty to inform his official superiors of any serious misconduct on the part of his subordinates ; for the defendant is in some degree answerable for the faults of those immediately under his control. But it does not follow that, if A. and B. are officers or clerks of equal rank and standing, it is the duty of A. to tell tales of B., except in self-defence ; for A's superiors expect him to do his own work merely, and have not invested him with any authority or control over B. (See *Belle* v. *Parke*, 10 Ir. C. L. R. 284 ; 11 Ir. C. L. R. 413.)

Illustrations.

My regular solicitor may unasked give me any information concerning third persons of which he thinks it to my interest that I should be informed, even although he is not at the moment conducting any legal proceedings for me.

Davis v. *Reeves*, 5 Ir. C. L. R. 79.

A solicitor who is conducting a case for a minor may inform his next friend of the minor's misconduct.

Wright v. *Woodgate*, 2 C. M. & R. 573 ; 1 Tyr. & G. 12 ; 1 Gale, 329 (approved in L. R. 4 P. C. 495.)

[*212] Rumours being in circulation prejudicial to the character of the plaintiff, a dissenting minister, he courted inquiry, and appointed A. to sift the

matter thoroughly. It was agreed that the defendant should represent the malcontent portion of the congregation, and state the case against the plaintiff to A. A confidential relationship being thus established between the defendant and A., all that took place between them, whether by word of mouth or in writing, so long as the inquiry lasted, and relative thereto, was held to be privileged.

Hopwood v. *Thorn*, 8 C. B. 293; 19 L. J. C. P. 94; 14 Jur. 87.

A report by the Comptroller of the Navy to the Board of Admiralty upon the plans and proposals of a naval architect is clearly privileged. Per Grove, J., in

Henwood v. *Harrison*, L. R, 7 C. P. 606; 41 L. J. C. P. 206; 20 W. R. 1000; 26 L. T. 938.

A timekeeper employed on public works, on behalf of a public department, wrote a letter to the secretary of the department, imputing fraud to the contractor. Blackburn, J., directed the jury that if they thought the letter was written in good faith and in the discharge of the defendant's duty to his employers, it was privileged, although written to the wrong person.

Searll v. *Dixon*, 4 F. & F. 250.

A relation or intimate friend may confidentially advise a lady not to marry a particular suitor, and assign reasons, provided he really believes in the truth of the statements he makes.

Todd v. *Hawkins*, 2 M. & Rob. 20; 8 C. & P. 88.

And see per Erskine, *amicum curiæ*, 2 Smith, 4.

Adams v. *Coleridge*, 1 Times L. R. 84.

The defendant and Tinmouth were joint owners of *The Robinson*, and engaged the plaintiff as master; in April, 1843, defendant purchased Tinmouth's share; in August, 1843, defendant wrote a business letter to Tinmouth, claiming a return of £150, and incidentally libelled the plaintiff. *Held* a privileged communication, as the defendant and Tinmouth were still in confidential relationship.

Wilson v. *Robinson*, 7 Q. B. 68; 14 L. J. Q B. 196; 9 Jur. 726.

The defendant, a linendraper, dismissed his apprentice without sufficient legal excuse: he wrote a letter to her parents, informing them that the girl would be sent home, and giving his reasons for her dismissal. Cockburn, C. J., held this letter privileged, as there was clearly a confidential relationship between the girl's master and her parents.

James v. *Jolly*, Bristol Summer Assizes, 1879.

See *Fowler and wife* v. *Homer*, 3 Camp. 294.

So of course a letter to the girl herself stating in detail the faults her late employer found with her.

R. v. *Perry*, 15 Cox, C. C. 169.

But a complaint of a man's conduct is not privileged, if addressed by the employer to the man's wife.

Jones v. *Williams*, 1 Times L. R. 572.

The officers and men of the garrison of St. Helena gave an entertainment at the theatre at which considerable noise and disturbance took place. The commanding officer was informed that this was caused by the plaintiff who was said to have been drunk. The plaintiff was an assistant master in the Government School. The commanding officer reported the circumstances to the colonial [*213] secretary of the island, and the plaintiff was in consequence suspended from his appointment. Verdict for the plaintiff disapproved and set aside, and judgment arrested.

Stace v. *Griffith*, L. R. 2 P. C. 426; Moore, P. C. C. N. S. 18; 20 L. T. 197.

Sutton v. *Plumridge*, 16 L. T. 741.

It is the duty of an under-master in a college school to inform the head-master that reports have been for some time in circulation imputing habits of drunkenness to the second-master.

Hume v. *Marshall*, (Cockburn, C. J.), 42 J. P. 136.

But where, after an election, the agent of the defeated candidate wrote a letter to the agent of the successful candidate, asserting that the plaintiff and another (both members of the successful candidate's committee) had bribed a

particular voter, the latter was held not to be privileged, as there was no confidential relation exising between the two agents.

Dickeson v. *Hilliard and another*, L. R. 9 Ex. 79 ; 43 L. J. Ex. 37 ; 22 W. R. 372 ; 30 L. T. 196.

A circular letter, sent by the secretary to the members of a society for the protection of trade against sharpers and swindlers, is not a privileged communication.

Getting v. *Foss*, 3 C. & P. 160.

Goldstein v. *Foss*, 2 C. & P. 252 ; 6 B. & C. 154 ; 4 Bing. 489 ; 2 Y. & J. 146 ; 4 D. & R. 197 ; 1 M. & P. 402.

Humphreys v. *Miller*, 4 C. & P. 7.

But now see *Waller* v. *Loch*, (C. A.), 7 Q. B. D. 619; 51 L. J. Q. B. 274; 30 W. R. 18 ; 45 L. T. 243 ; 46 J. P. 484.

Clover v. *Royden*, L. R. 17 Eq. 190 ; 43 L. J. Ch. 665 ; 22 W. R. 254 ; 29 L. T. 639.

Newbold v. *Bradstreet and Son*, 57 Maryland, 38 ; 40 Amer. Rep. 426.

(*d*) *Information volunteered when there is no confidential relationship existing between the parties.*

Where the defendant does not stand in any confidential relation to the person interested, it is difficult to define what circumstances will be sufficient to impose on him the duty of volunteering the information. The rule of law applicable to such cases cannot be better expressed then in the following passage :—" Where a person is so situated that it becomes right in the interests of society that he should tell to a third person certain facts, then if he *bonâ fide* and without malice does tell them it is a privileged communication," (per Blackburn, J., in *Davies* v. *Snead*, L. R. 5 Q. B. 611 ; 39 L. J. [* 214] Q. B. 202 ; 23 L. T. 609)—a passage cited with approval by Jessel, M. R., and Brett, L. J., in *Waller* v. *Loch*, (C. A.), 7 Q. B. D. 621, 622 ; 51 L. J. Q. B. 274 ; 30 W. R. 18 ; 45 L. T. 242 ; 46 J. P. 484. But the difficulty is in any given case to determine whether it had or had not become right in the interests of society that the defendant should act as he did. And this is a question rather of social morality than of law.

For instance, if I learn that one of my tradesmen is about to supply goods on credit to a man whom I know to be practically insolvent, am I to tell him not to do so ? Is it right, in the interests of society, that I should tell him what I know, or am I to stand by and see him lose his money ? In the days of Elizabeth, it was considered clear law that no action would lie for such a caution given as " good counsel. (*Vanspike* v. *Cleyson*, Cro. Eliz. 541 ; 1 Roll. Abr. 67.) So it was in the days of George III. (*Herber* v. *Dowson*, B. N. P. 8). But in 1838 Lord Abinger, C. B., held that no such communication should be *volunteered* : the defendant must wait till the tradesman comes to him for advice. " If the defendant had been asked by the plaintiff as to the plaintiff, and had said what he did without malice no action would have been maintainable ; but as he made the communication without being asked in any way to do so, he is liable to an action, if the words reflect on the character of the plaintiff as a tradesman. (*King* v. *Watts*, 8 C. & P. at p. 615.) And in *Bennett*

v *Deacon* (1846), 2 C. B. 628 ; 15 L. J. C. P. 289, the Court of Common Pleas was equally divided on this question. I venture to think that the judgments of Tindal, C. J., and Erle, J., would be followed in the present day rather than those of Coltman and Gresswell, JJ. I think such a caution would be held privileged if made on adequate grounds out of concern for the person cautioned, and not from any spite against the plaintiff.

In *Coxhead* v. *Richards* (1846, 2 C. B. 569 ; 14 L. J. C. P. 278 ; 10 Jur. 984, the same Court was equally divided on a very similar question, whether a man may inform the owner of a ship that his captain has been guilty of gross misconduct at sea. Here, again, I think the view taken by Tindal, C. J., and Erle, J., would probably prevail in the present day. Willes, J., said in *Amann* v. *Damm* (1860), 8 C. B. N. S. at p. 602 ; 29 L. J. C. P. at p. 314, that he was prepared "to go the whole length" with them. It was admitted on all hands in *Clark* v. *Molyneux*, 3 Q. D. 237; 47 L. J. Q. B.[*215] 230 ; 26 W. R. 104 ; 36 L. T. 466 ; 37 L. T. 694 ; 14 Cox, C. C. 10, that a letter sent to an absent vicar, informing him of the misconduct of the curate whom he had left in charge of the parish, was privileged. And generally, am I not always justified in informing a master or employer of any misconduct on the part of his servant or workman which has come to my knowledge, and not to his ? It is submitted that such a communication is privileged, although volunteered, if made honestly from a sense of duty, and not officiously, or from a love of gossip.

"If a neighbour makes inquiry of another respecting his own servants, that other may state what he believes to be true ; but the case is different when the statement is a voluntary act ; yet, even in this case, the jury is to consider whether the words were dictated by a sense of the duty which one neighbour owes to another." (Per Coltman, J., in *Rumsey* v. *Webb et ux.* (1842), Car. & M. at p. 105 ; and this direction was approved by the Court, 11 L. J. C. P. 129.) In *Brooks* v. *Blanshard* (1833), 1 Cr. & M. 779 ; 3 Tyrw. 844, the plaintiff was neither in the employ of the Wear Commissioners, nor seeking such employment, at the time when the defendant wrote the letter which afterwards prevented plaintiff's election ; otherwise it would probably have been held a privileged communication. So was the oral statement in *Harris* v. *Thompson* (1853), 13 C. B. 333. In both cases the communication was volunteered.

It appears to be clear that if the defendant reasonably believes that human life would be seriously imperilled by his remaining silent he may volunteer information to those thus endangered, or to their master, though he be not himself personally concerned (see per Cresswell, J., 2 C. B. 605.) So if the money or goods of the person to whom he speaks would be in great and obvious danger of being stolen or destroyed. So too it appears that the defendant may, without being applied to for the information, acquaint a master with the misconduct of his servants, if instances have come under especial notice of the defendant which have been concealed from the master's eye. But in most other cases the defendant runs a great risk in volunteering statements which afterwards turn out to be

accurate, unless indeed he is himself personally interested [*216) in the matter, or compelled to interfere by the fiduciary relationship in which he stands to some person concerned. Although the defendant may feel sure that if he were in his neighbour's place, he should be most grateful for the information conveyed, still he must recollect that it may eventually turn out, that in endeavouring to avert a fancied injury to that neighbour, he has really inflicted an undoubted and undeserved injury on the plaintiff.

Of course defendant must at the time he makes the statement sincerely believe in its truth. But this alone will afford him no defence. (*Botterill* v. *Whytehead*, 41 L. T. 588.) It is necessary further that circumstances should be present to his mind which reasonably impose on him a duty to make such statement. If such circumstances exist, the statement is privileged, although it may prove to be untrue. It is not necessary that before making such statement the defendant should have thoroughly investigated the reports which had reached him. Hearsay is sufficient reasonable and probable cause in the absence of malice. (*Maitland* v. *Bramwell*, 5 F. & F. 623 ; *Coxhead* v. *Richards*, 2 C. B. 569 ; 15 L. J. C. P. 278 ; *Lister* v. *Perryman*, L. R. 4 H. L. 521 ; 39 L. J. Ex. 177 ; 23 L. T. 269) ; unless the defendant ought for any reason to have known that his informant was unreliable and his story undeserving of belief. And, lastly, the defendant must make the statement under an honest sense of duty, desiring to serve the person most concerned, and not from any malicious or self-seeking motive.

It is the province of the judge to decide whether a communication is privileged or not, when the facts are undisputed. If therefore, although the defendant alleges that he acted under an honest sense of duty, the judge can see no evidence of any circumstances raising such a duty, he should rule that no *primâ facie* case of privilege has been established. If, however, circumstances have been proved before him, rendering the alleged sense of duty reasonably possible, the judge should leave to the jury the question : Did the defendant honestly believe it to be his duty to make the communication complained of, and did he do so under a sense of that duty ?

[*217] In deciding this question, the jury must not ask themselves merely, " Should we have acted as the defendant has done in such circumstances ? " for different people act differently in similar perplexities. Moreover the matter has been thoroughly investigated by the time it comes before the jury, and what to the defendant at the time seemed matter of serious suspicion has all been explained away in court. The jury must place themselves in the position of the defendant at the time these suspicious circumstances were brought to his knowledge, when first the question arose in his mind " ought I not to inform A. ? " It may well be that another man would have said, " It is no concern of mine," and would have done nothing (which is always the safer course). But that does not prove that defendant was wrong in acting as he did. It is not sufficient for the defendant merely to swear, " I acted under a sense of duty,"

if no other reasonable man would have so acted in the same circumstances. But the jury should find for the defendant if they are satisfied that he both honestly felt, and had reasonable grounds for feeling, that he could not conscientiously allow A. to continue in secure ignorance, but that he must communicate to him that which he was so much concerned to know.

Illustrations.

A. and B. are tenants to the same landlord with similar clauses in their respective leases. A. has reason to believe that B. is breaking his covenants, committing waste, violating the rotation of crops, &c. The landlord is away abroad. It is submitted on the authority of *Cockayne* v. *Hodgkisson*, 5. C. & P. 543, *ante* p. 209, that it is *not* the duty of A. to write and inform the landlord of his suspicions, and that therefore such a letter would not be privileged; unless the landlord had in some way set A. in authority over B.

A housemaid thinks the cook is robbing their master. It is not her duty to speak at once on bare suspicion merely; but as soon as she sees something which reasonably appears to her inconsistent with the cook's innocence, she will be justified, it is submitted, in telling her master all she knows.

"If a man write to a father scandalous matter concerning his children, of which he gives notice to the father and adviseth the father to have better regard to his children; this is only reformatory, without any respect of profit to him which wrote it; it shall not be intended to be a libel."

Peacock v. *Reynal* (1612), 2 Brownlow & Goldesborough, 151.

Approved by Erle, C. J., 15 C. B. N. S. 418; 33 L. J. C. P. 95.

Communications confidentially made to a master as to the conduct of his servants, by one who has had an opportunity of noticing certain malpractices on their part, are privileged.

Cleaver v. *Sarraude*, 1 Camp. 268.

Kine v. *Sewell*, 3 M. & W. 297.

Amann v. *Damm*, 8 C. B. N. S. 597; 29 L. J. C. P. 313; 7 Jur. N. S. 47; 8 W. R. 470.

Masters v. *Burgess*, 3 Times L. R. 96.

[*218] The occupier of a house may complain to the landlord of the workmen he has sent to repair the house.

Toogood v. *Spyring*, 1 C. M. & R. 181; 4 Tyrw. 582.

A landlord may, it seems, complain to his tenant of the conduct of her lodgers.

Knight v. *Gibbs*, 1 A. & E. 43; 3 N. & M. 467.

If a report be current in a parish as to the disgraceful conduct of the incumbent, bringing scandal on the church, a good churchman may inform the bishop of the diocese thereof, although he does not reside in the district and is not personally interested.

James v. *Boston*, 2 C. & K. 4.

A letter written by a private individual to the chief secretary of the Postmaster-General complaining of the misconduct of an official under the authority of the Postmaster-General, is privileged, if made *bonâ fide* and without malice, even though some of the charges made in the letter may not be true, and though the defendant stood in no relation, past or present, either to the plaintiff or to the Post Office authorities.

Blake v. *Pilfold*, 1 Moo. & Rob. 198.

Woodward v. *Lander*, 6 C. & P. 548.

The first mate of a merchant ship wrote a letter to the defendant, an old and intimate friend, stating that he was placed in a very awkward position owing to the drunken habits, &c., of the captain, and saying:—"How shall I act? It is my duty to write to Mr. Ward (the owner of the ship), but my doing so would ruin" the captain and his wife and family. The defendant, after much deliberation and consultation with other nautical friends, thought it his duty to show the letter to Ward, who thereupon dismissed the captain. The defendant knew nothing of the matter except from the mate's letter. Tindal, C. J., told the

jury that the publication was *primâ facie* privileged ; and they negatived malice. The Court of C. P. was equally divided on the question whether so showing the letter was privileged ; and therefore the verdict for the defendant stood.

Coxhead v. *Richards*, 2 C. B. 569 ; 15 L. J. C. P. 278 ; 10 Jur. 984.

A lieutenant in the navy was appointed by the Government agent or superintendent on board a transport ship, *The Jupiter*. He wrote a letter to the secretary of Lloyd's Coffee-house imputing misconduct and incapacity to the plaintiff, the master of *The Jupiter*. This was held altogether unprivileged ; the information should have been given to the Government alone, by whom the defendant was employed.

Harwood v. *Green*, 3 C. & P. 141.

The defendant said to one Dudley, "Doth Vanspike (the plaintiff, a merchant) owe you any money ?" Dudley replied that he did. Defendant then said, "You had best call for it ; take heed how you trust him." And it was adjudged for the defendant ; for it is not any slander to the plaintiff, but good counsel to Dudley.

Vanspike v *Clyson* (1597), Cro. Eliz. 541 ; 1 Roll. Abr. 67.

So where defendant said of the plaintiff, who was a tradesman, "He cannot stand it long, he will be a bankrupt soon ;" and it was laid as special damage in the declaration, that one Lane had, in consequence, refused to trust the plaintiff for a horse. Lane was the only witness called for the plaintiff ; and it appearing on his evidence, that the words were not spoken maliciously, but in confidence and friendship to Lane, and by way of warning to him, and that in [* 219] consequence of that advice he did not trust the plaintiff with the horse: Pratt, C. J., directed the jury, that though the words were otherwise actionable yet if they should be of opinion that the words were not spoken out of malice, but in the manner before mentioned, they ought to find the defendant not guilty and they did so accordingly.

Herver v. *Dowson* (1765), B. N, P. 8.

The plaintiff was a maltster, and had bought a quantity of barley of Butler. The defendant said to Butler, "Don't trust that damned rogue, he will never pay you a farthing. Have you sold King some barley ? You mind and have the money for it before it goes out of the waggon, or you will never have it." Butler, in consequence, refused to deliver the barley till he was paid for it. Lord Abinger, C. B,, directed the jury that the defendant's words were unprivileged, because they were volunteered. Verdict for the plaintiff accordingly. Damages, one farthing,

King v. *Watts*, 8 C. & P. 614.

Defendant met Clark in the road, and asked him if he had sold his timber yet. Clark replied that Bennett (plaintiff) was going to have it. Defendant asked if he was going to pay ready money for it, and being answered in the negative, said, "Then you'll lose your timber ; for Bennett owes me about £25, and I am going to arrest him next week for my money, and your timber will help to pay my debt." Clark consequently declined to sell the timber to the plaintiff. Plaintiff really did owe defendant about £23. Coltman, J., directed the jury that the caution was altogether unprivileged because *volunteered :* and they therefore found a verdict for the plaintiff, damages 40*s*. The Court of C. P. were equally divided on the question whether the judge was right in his direction, and therefore the verdict for the plaintiff stood.

Bennett v, *Deacon*, 2 C, B, 628 ; 15 L. J. C. P. 289.

A former friend of the plaintiff, who knew all about plaintiff's past wild life, hearing plaintiff was about to be married, wrote, after consulting the clergyman of his parish to the lady, to whom he was apparently a stranger, disclosing plaintiff's antecedents. Hill, J., said, that if the jury thought the defendant reasonably believed that it was his duty to write the letter he should hold it to be privileged ; but the jury found a verdict for the plaintiff ; damages, 1*s* ; [obviously a compromise].

Ex relatione Coleridge, Q. C., 15 C, B. N. S, 410, 411.

It is apparently clear law in America, that though any near relative may write such a letter warning a lady not to marry the plaintiff, no mere friend, not related to her, may *volunteer* such advice. Though the friendship may be

most intimate and of long standing, there is no privilege unless the lady has consulted her friend on the matter.

Krebs v. *Oliver*, 12 Gray (78 Mass.) 239.

Count Joannes v. *Bennett*, 5 Allen (87 Mass.), 169.

Byam v. *Collins* (1886), 39 Hun. (46 N. Y. Supr. Ct.), 204.

A. and B. were shareholders in the same railway company. B. was also a River Commissioner. The plaintiff, who had been engineer to the railway company, sought to be elected engineer to the River Commissioners, but was unsuccessful. Shortly after the election, A. wrote to B. that the plaintiff's [* 220] mismanagement or ignorance had cost the railway company several thousand pounds. *Held* not a privileged communication.

Brooks v. *Blanshard*, 1 Cr. & Mees. 779; 3 Tyrw. 844.

The defendant was a director of two companies; of one of which the plaintiff was secretary, of the other auditor. The plaintiff was dismissed from his post as secretary of the first company for alleged misconduct. Thereupon the defendant, at the next meeting of the board of the second company, informed his co-directors of this fact, and proposed that he should also be dismissed from his post of auditor of the second company. *Held* a privileged communication.

Harris v. *Thompson*, 13 C. B. 333.

Dawes told the defendant that he intended to employ the plaintiff as surgeon and accoucheur at his wife's approaching confinement; the defendant thereupon advised him not to do so, on account of the plaintiff's alleged immorality. Martin, B., thought this was a privileged communication, though it was volunteered.

Dixon v. *Smith*, 29 L. J. Ex. 125; 5 H. & N. 450.

The directors of a charity were informed that the plaintiff, their former collector, continued to solicit and receive subscriptions on behalf of the charity, although dismissed as untrustworthy. They therefore printed at the end of their annual report a "Caution to the Public," warning them against such imposture. *Held*, that such a caution was privileged, if published *bonâ fide* in the belief that the statements contained in it were true, and with the honest desire of protecting the interests of the charity, and guarding the public against imposture, and not with any malicious desire of defaming the plaintiff, with whom they had quarrelled; and that it was for the jury to decide with which intent it was in fact published.

Gassett v. *Gilbert and others*, 6 Gray (72 Mass.), 94.

The defendant, a parishioner, mentioned to her rector a report, widely current in the parish, that the rector and his solicitor were grossly mismanaging a trust estate, and defrauding the widow and orphans, &c. The solicitor brought an action for the slander. The jury found that she did so in the honest belief that it was a benefit to the rector to inform him of the report in order that he might clear his character. The Court held that the statement was clearly privileged so far as the rector was concerned, and that as the statement was not divisible it must also be privileged with regard to the plaintiff.

Davies v. *Snead*, L. R. 5 Q. B. 611; 39 L. J. Q. B. 202; 23 L. T. 609.

Information given to a vicar absent on the continent as to rumours affecting the moral character of the curate he has left in charge is privileged: so is similar information given verbally to the absent vicar's solicitor, with a view to his informing the vicar, should he think it right to do so: so is similar information given to a neighboring vicar who has asked the curate in charge to preach for him.

Clark v. *Molyneux*, 3 Q. B. D. 237; 47 L. J. Q. B. 230; 26 W. R. 104; 36 L. T. 466; 37 L. T. 694; 14 Cox, C. C. 10.

The plaintiff, an architect, had been employed by a certain committee to superintend and carry out the restoration of Skirlaugh Church; thereupon the defendant, who was a clergyman residing in the county, but who had no manner [* 221] of interest in the question of the employment of the plaintiff to execute the work, wrote a letter to a member of the committee saying, "I see that the restoration of Skirlaugh Church has fallen into the hands of an architect who is a Wesleyan and can have no experience in church work. Can you not do

something to avert the irreparable loss which must be caused if any of the masonry of this ancient gem of art be ignorantly tampered with?" The letter was clearly a libel on the plaintiff in the way of his profession or calling. Bramwell, L. J., thought it was privileged, because the restoration was a matter of public interest, and one in which a neighbouring clergyman would be especially interested; but a special jury found that there was evidence of malice in the unfair expressions employed, and gave the plaintiff £50 damages. But Kelly, C. B., on a motion for a new trial, declared that he was "at a loss to see what privilege the defendant possessed, under the circumstances of the case, to interfere between the committee and the plaintiff in respect of the contract between them; the defendant being neither the patron, nor the minister of the church, nor a member of the committee appointed to effect its restoration, nor even a parishioner."

[It did not appear that the defendant was even a subscriber to the restoration fund.]

Botterill and another v. *Whytehead*, 41 L. T. 588.

Two ladies, A. and B., were interested in the plaintiff, a lady who "had seen better days." A. applied to the Charity Organization Society for information concerning the plaintiff. Defendant, the secretary of that society, drew up and sent A. a report unfavourable to the plaintiff, and gave A. permission to show it to B. *Held*, that the publication of this report both to A. and to B. was privileged, although B. had made no inquiries of the defendant, and was not a member of the society or in any way connected with it.

Waller v. *Loch* (C. A.), 7 Q. B. D. 619; 51 L. J. Q. B. 274; 30 W. R. 18; 45 L. T. 242; 46 J. P. 484.

Clover v. *Royden*, L. R. 17 Eq. 190; 43 L. J. Ch. 665.

(iii.) *Information as to crime or misconduct of others.*

It is a duty which every one owes to society and to the State to assist in the investigation of any alleged misconduct, and to promote the detection of any crime. All information given *bonâ fide* in response to any inquiries made with this object is clearly privileged (*ante*, p. 204). But this duty does not arise merely when confidential inquiries are made. If facts come under my knowledge which lead me reasonably to conclude that a crime has been, or is about to be, committed, it is my duty at once to give information to the police or to the persons interested.

"When it comes to the knowledge of any one that a [* 222] crime has been committed, a duty is laid on that person, as a citizen of the country, to state to the authorities what he knows respecting the commission of the crime; and if he states only what he knows and honestly believes he cannot be subjected to an action of damages merely because it turns out that the person as to whom he has given the information is, after all, not guilty of the crime." (Per Inglis, Lord President, in *Lightbody* v. *Gordon*, 9 Scotch Sessions Cases, 4th Series, 937, 938.)

So all material statements made by the persons interested in the detection of a crime, during their investigations and relevant thereto, are privileged. "For the sake of public justice, charges and communications which would otherwise be slanderous, are protected if *bonâ fide* made in the prosecution of an inquiry into a suspected crime." (Per Coleridge, J., in *Padmore* v. *Lawrence*, 11 A. & E. 382.) See also the remarks of Lord Eldon, C. J., in *Johnson* v. *Evans*, 3 Esp. 33, and of Lord Ellenborough in *Fowler et ux.* v. *Homer*, 3 Camp., at p. 295. But such charges must be made in the

honest desire to promote the ends of justice, and not with any spiteful or malicious feeling against the person accused, nor with the purpose of obtaining any indirect advantage to the accuser. Nor should serious accusations be made recklessly or wantonly; they must always be warranted by some circumstances reasonably arousing suspicion. And they should not be made unnecessarily to persons unconcerned, nor before more persons, nor in stronger language, than necessary. (*Roberts* v. *Richards*, 3 F. & F. 507.)

Illustrations.

Defendant discharged his servant, the plaintiff, and sent for a constable, intending to give her in charge. All that he said to the constable in the course of his charge and complaint against the plaintiff is privileged, although ultimately he did not give her into charge.

Johnson v. *Evans, Clerk*, 3 Esp. 32.

Defendant was a haberdasher. On a Saturday evening, while he was absent, Mrs. Fowler came into his shop and bought some goods. Soon after she was gone his shopman missed a roll of riband, and mistakenly supposed that she [* 223] had stolen it, but did not then pursue her. On the following Monday, as she was again passing the shop, the shopman pointed her out to the defendant as the person who had stolen the riband. The defendant brought her into the shop and accused her of the robbery, which she positively denied. He then took her into an adjoining room and sent for her father, to whom he repeated the accusation. After a good deal of altercation she was allowed to go home, and there the matter rested. Lord Ellenborough decided that no action lay.

Fowler et ux. v. *Homer*, 3 Camp. 294.

Mensel sent his servant, the plaintiff, to the defendant's shop on business; while there, the plaintiff had occasion to go into an inner room. Shortly after he left, a box was missed from that inner room. No one else had been in the room except the plaintiff. The defendant thereupon went round to Mr. Mensel's, and calling him aside into a private room, told him what had happened, adding that the plaintiff must have taken the box. Later on, the plaintiff came to the defendant's house, and the defendant repeated the accusation to him; but, an English girl being present, defendant was careful to speak in German. Both communications were held privileged, if made without actual malice and in the *bonâ fide* belief of their truth.

Amann v. *Damm*, 8 C. B. N. S. 597; 29 L. J. C. P. 313; 7 Jur. N. S. 47; 8 W. R. 470.

Hurtert v. *Weines*, 27 Iowa, 134.

Dale v. *Harris*, 13 Browne (109 Mass.), 193.

Defendant charged the plaintiff, his porter, with stealing his bed-ticks, and with plaintiff's permission subsequently searched his house, but found no stolen property. The jury found that defendant *bonâ fide* believed that a robbery had been committed by the plaintiff, and made the charge with a view to investigation, but added, "The defendant ought not to have said what he could not prove." *Held*, that this finding was immaterial, that the occasion was privileged, and that there was no evidence of malice. Judgment for the defendant.

Howe v. *Jones*, 1 Times L. R. 19, 461.

Fowler et ux. v. *Homer*, 3 Camp. 294.

Farquharson forged the name "J. Smith" on a cheque and sent a boy to present it and get the money. The defendant was cashier of the bank. He looked hard at the boy, and satisfied himself as he thought that it was Smith's boy, the plaintiff, and so gave him the money. When inquiries were made, defendant told Smith it was his boy who presented the cheque, and described him accurately. He told the detective so too. Plaintiff was accordingly tried along with Farquharson, who pleaded guilty. The sheriff found the charge not proven against the plaintiff. Then plaintiff sued defendant and recovered

damages £50, by a verdict of eight jurymen to four. The Court set the verdict aside on the ground that there was no evidence whatever of malice.

Lightbody v. *Gordon*, 9 Scotch Sessions Cases, 4th Series, 934.

Barton, a friend of the defendant, employed a builder, the plaintiff's master, to build a house for him: the defendant informed Barton that the plaintiff while at work on his house had removed some quarterings. Barton complained to the master builder, who came down to the defendant's and said, "I am told you say that you saw my man Kine take away some of the quarterings from Mr. Barton's premises." A repetition of the charge made then to the plaintiff's master without malice was held privileged, and as the plaintiff had not called Barton to [*224] prove the original remark, the jury found for the defendant, and a new trial was refused. Parke, B., said, "Is a man's mouth to be closed when I ask him if he has seen another man take away my timber?"

Kine v. *Sewell*, 3 M. & W. 297.

[But note that the statement made to Barton would, if proved, have been probably held privileged also, although voluntary, as he was the owner of the property alleged to have been stolen.]

Certain merchants in New York, believing on reasonable grounds that they had been defrauded by plaintiff and others, drew up an agreement reciting that they had "been robbed and swindled" by plaintiff and others named, whom they were determined to prosecute, and promising that each person signing would pay his fair share towards the expenses of the prosecution, &c. This agreement was left with A.'s manager in order that he might procure A.'s signature thereto. *Held* a privileged publication.

Klinek v. *Colby and others*, 1 Sickel (46 N. Y.) 427.

Defendant accused the plaintiff, in the presence of a third person, of stealing his wife's brooch; plaintiff wished to be searched; defendant repeated the accusation to two women, who searched the plaintiff and found nothing. Subsequently it was discovered that defendant's wife had left the brooch at a friend's house. *Held*, that the mere publication to the two women did not destroy the privilege attaching to charges, if made *bonâ fide*; but that all the circumstances should have been left to the jury, who should determine whether or no the charge was made recklessly and unwarrantably, and repeated before more persons than necessary.

Padmore v. *Lawrence*, 11 A. & E. 380; 4 Jur. 458; 3 P. & D. 209.

Jones v. *Thomas*, 34 W. R. 104; 53 L. T. 678; 2 Times L. R. 95.

A discharged servant of the defendant's charged plaintiff, her former manager, with embezzlement. Defendant went to plaintiff's house, and, finding him out, said to his wife, "He has robbed me." This was held not to be privileged; though the jury found that defendant spoke in the performance, as she believed, of a duty and in the *bonâ fide* belief that what she said was true, and without malice. Judgment for the plaintiff. Damages £5.

Jones v. *Williams*, 1 Times L. R. 572.

Plaintiff assaulted the defendant on the highway; defendant, meeting a constable, requested him to take charge of the plaintiff, and the constable refusing to arrest the plaintiff unless the defendant would charge him with felony, the defendant did so. *Held*, on demurrer to the defendant's plea setting up these circumstances, that they did not render the charge of felony a privileged publication.

Smith v. *Hodgeskins*, Cro. Car. 276.

Plaintiff was defendant's shopman in Plymouth till Nov. 5th, 1834, when he left and went to London, receiving from the plaintiff a good character for steadiness, honesty, and industry. Early in December defendant found one of his female servants in possession of some of his goods. When charged with stealing them, she said that the plaintiff gave them to her. Thereupon the defendant, though he knew the girl was of bad character, went to the plaintiff's relations in Plymouth and charged him with felony, and eventually induced them to give him fifty pounds to say no more about the matter. *Held*, that the charge of felony was not made *bonâ fide* with any intention to promote investigation or [*225] prosecution, and was altogether unprivileged; and that no question as to malice in fact should have been left to the jury.

Hooper v. *Truscott*, 2 Bing. N. C. 457; 2 Scott, 672.

Plaintiff and defendant were neighbours and both drapers. Defendant, from facts which came to his knowledge and which were sufficient to arouse suspicion, concluded that he was being robbed by one of his assistants with the collusion of the plaintiff. He went to A., in whose employ plaintiff had formerly been, and inquired as to plaintiff's honesty. A. asked, "What do you want to know for?" Defendant replied, "Oh, the man has robbed me; I mean to get him imprisoned." Defendant then made inquiries of B., one of his own assistants, who said she knew nothing at all of the matter, whereupon defendant repeated what he had said to A. Damages £5. Lindley, J., on further consideration, held both statements unprivileged, as neither A. nor B. was concerned in or connected with the matter.

Harrison v. *Fraser*, 29 W. R. 652.

Charges against Public Officials.

So, too, it is the duty of all who witness any misconduct on the part of a magistrate or any public officer to bring such misconduct to the notice of those whose duty it is to inquire into and punish it; and, therefore, all petitions and memorials complaining of such misconduct, if prepared *bonâ fide* and forwarded to the proper authorities, are privileged. And it is not necessary that the informant or memorialist should be in any way personally aggrieved or injured: for all persons have an interest in the pure administration of justice and the efficiency of our public offices in all departments of the State. So with ecclesiastical matters; all good churchmen are concerned to prevent any scandal attaching to the Church. If, however, the informant be the person immediately affected by the misconduct complained of, he can claim privilege also on the ground that he is acting in self-defence. (See the next class of cases, p. 229.) Every communication is privileged which is made "*bonâ fide* with a view to obtain redress for some injury received, or to prevent or punish some public abuse. . . . This privilege, however, must not be abused; for if such a communication be made maliciously and without probable cause, the pretence under which it is made, [* 226] instead of furnishing a defence, will aggravate the case of the defendant." (Per Best, J., in *Fairman* v. *Ives*, 5 B. & Ald. 647, 648.) And a defendant will be taken to have acted maliciously, if he eagerly seizes on some slight and frivolous matter, and without any inquiry into the merits, without even satisfying himself that the account of the matter that has reached him is correct, hastily concludes that a great public scandal has been brought to light which calls for the immediate intervention of the Crown. (*Robinson* v. May, 2 Smith, 3.)

Illustrations.

A memorial to the Home Secretary or to the Lord Chancellor, complaining of misconduct on the part of a county magistrate, and praying for his removal from the commission of the peace, is privileged.

Harrison v. *Bush*, 5 E. & B. 344; 25 L. J. Q. B. 25, 99; 1 Jur. N. S. 846; 2 Jur. N. S. 90.

So is a petition to the House of Commons charging the plaintiff with oppression and extortion in his office of Vicar-General to the Bishop of Lincoln, although the petition was printed, and copies distributed amongst the members.

Lake v. *King*, 1 Lev. 240; 1 Saund. 131; Sid. 414; 1 Mod. 58.

The defendant deemed it his duty as a churchman to write to the Bishop of

London informing him that a report was current in the parish of Bethnal Green that a stand-up fight had occurred in the school-room of St. James the Great between the plaintiff, the incumbent, and the school-master, during school hours. The letter was held privileged under the Church Discipline Act, 3 & 4 Vict. c. 86, s. 3, although the defendant did not live in the district of which the plaintiff was incumbent, but in an adjoining district of the same parish.

James v. *Boston*, 2 B. & K. 4.

A letter written to the Postmaster-General, or to the secretary of the General Post Office, complaining of misconduct in a postmaster, is not a libel, if it was written as a *bonâ fide* complaint, to obtain redress for a grievance that the party really believed he had suffered; and particular expressions are not to be too strictly scrutinized, if the intention of the defendant was good.

Woodward v. *Lander*, 6 C. & P. 548.

Blake v. *Pilford*,1 Moo. & Rob. 198.

The defendant drafted a memorial to the Home Secretary on a matter within his jurisdiction, and read it to M. in the presence of M.'s wife, and asked M. to sign it. M. signed it, and the defendant then sent it to the Home Secretary. Grove, J., held that both the petition and the conversation with M. were *primâ facie* privileged.

Spackman v. *Gibney*, Bristol Spring Assizes, 1878.

The plaintiff was a sanitary inspector under the statute 41 & 42 Vict. c. 74, s. 42, appointed by the local authority, but removable by the Privy Council; [*227] the defendant addressed a letter to the Privy Council, charging the plaintiff with corruption and misconduct in his office. *Held*, that no action lay without proof of malice.

Proctor v. *Webster*, 16 Q. B. D. 112; 55 L. J. Q. B. 150; 53 L. T. 765.

Wieman v. *Mabee*, 45 Mich. 484; 40 Amer. R. 477.

But in seeking redress, the defendant must be careful to apply to some person who has jurisdiction to entertain the complaint, or power to redress the grievance, or some duty or interest in connection with it. Statements made to some stranger who has nothing to do with the matter cannot be privileged. If the defendant applies to the wrong person, through some natural and honest mistake as to the respective functions of various state officials, such slight and unintentional error will not take the case out of the privilege. (*Scarll* v. *Dixon*, 4 F. & F. 250.) But if he recklessly makes statements to some one who is, as he ought to have known, altogether unconcerned with the matter, the privilege is lost. (Hawk. Pl. Cr. 1. 544.)

And where the informant is himself the person aggrieved, he should be very careful not to be led away by his just indignation into misstating facts, or employing language which is clearly too violent for the occasion.

"If, without express malice, I make a defamatory charge which I *bonâ fide* believe to be true, against one whose conduct in the respect defamed has caused me injury, to one whose duty it is, or whose duty I reasonably believe it to be, to enquire into and redress such injury, the occasion is privileged; because I have an interest in the subject-matter of my charge, and the person to whom I make the communication has on hearing the communication a duty to discharge in respect of it." (Per Fitzgerald, B., in *Waring* v. *M'Caldin* (1873), 7 Ir. Rep. C. L. at p. 288.

Illustrations.

"A petition to the King upon matters in which the Crown cannot directly interfere" is privileged.

Per Best, J., 5 B. & Ald. 648.

An elector of Frome petitioned the Home Secretary, stating that the plaintiff, [*228] a magistrate of the borough, had made speeches inciting to a breach of the peace, and praying for an inquiry, and that the Home Secretary should advise her Majesty to remove the plaintiff from the commission of the peace. Such petition was held to be privileged, although it should more properly have been addressed to the Lord Chancellor.

Harrison v. *Bush*, 5 E. & B. 344; 25 L. J. Q. B. 23, 59; 1 Jur. N. S. 846; 2 Jur. N. S. 90.

Scarll v. *Dixon*, 4 F. & F. 250, *ante*, p. 212.

The plaintiff was about to be sworn in as a paid constable, by the justices, when the defendant, a parishioner, made a statement against the plaintiff's character in the hearing of several by-standers. *Held*, that even if such statement ought rather to have been made to the vestry who drew up the list of constables whom the justices were to swear in, still it was privileged, if made *bonâ fide* in furtherance of the ends of justice.

Kershaw v. *Bailey*, 1 Ex. 743; 17 L. J. Ex. 129.

A letter to the Secretary at War, with the intent to prevail on him to exert his authority to compel the plaintiff (an officer of the army) to pay a debt due from him to defendant, was held privileged, although the Secretary at War had no *direct* power or authority to order the plaintiff to pay his debt. "It was an application," says Best, J., "for the redress of a grievance, made to one of the King's ministers, who, as the defendant honestly thought, had authority to afford him redress."

Fairman v. *Ives*, 5 B. & Ald. 642; 1 Chit. 85; 1 D. & R. 252.

A timekeeper employed on public works, on behalf of the Board of Works, wrote a letter to the secretary of the Board, imputing fraud to the contractor. Blackburn, J., directed the jury that if they thought the letter was written in good faith and in the discharge of what the defendant considered his duty to his employers, it was privileged, although such a complaint should have been addressed to Mr. Harris, the resident engineer.

Scarll v. *Dixon*, 4 F. & F. 250.

Tompson v. *Dashwood*, 11 Q. B. D. 43; 52 L. J. Q. B. 425; 48 L. T. 943; 48 J. P. 55.

The plaintiff was a teacher in a district school; the inhabitants of the district prepared a memorial charging the plaintiff with drunkenness and immorality, which they sent to the local superintendent of schools. It ought strictly to have been sent to the trustees of that particular school in the first instance, and such trustees would then, if they thought fit, in due course forward it to the local superintendent for him to take action upon it. *Held*, that the publication was still *primâ facie* privileged, although, by a mistake easily made, it had been sent to the wrong quarter in the first instance.

McIntyre v. *McBean*, 13 Up. Canada Q. B. Rep. 534.

But where the defendant wrote a letter to the Home Secretary complaining of the conduct of the plaintiff, a solicitor, as clerk to the borough magistrates, this was held not to be privileged, because Sir James Graham had no power or jurisdiction whatever over the plaintiff. There was moreover evidence of malice.

Blagg v. *Sturt*, 10 Q. B. 899; 16 L. J. Q. B. 39; 8 L. T. (Old S.) 135; 11 Jur. 101, *post*, p. 279.

An Irish coroner sent to the Chief Secretary of Ireland a report of an inquest he had held on the body of an out-door pauper, and at which the plaintiff, who was [*229] the relieving officer, had given evidence. He mentioned in this report that the parish priest, who happened to be in court, stated publicly at the conclusion of plaintiff's evidence, "This is nothing short of perjury." *Held*, that this portion of the report at all events was not privileged, as the Chief Secretary could have no interest in hearing Father Callary's opinion of the plaintiff's evidence.

Lynam v. *Gowing*, 6 L. R. Ir. 259.

B. Communications made in self-defence.

(iv.) *Statements necessary to protect defendant's private interests.*

Any communication made by the defendant is privileged which a due regard to his own interest renders necessary. He is entitled to protect himself. But in such cases it must clearly appear not merely that some such communication was necessary, but that he was compelled to employ the very words complained of. If he could have done all that his duty or interest demanded without libelling or slandering the plaintiff, the words are not privileged. Thus, it is very seldom necessary in self-defence to impute evil motives to others, or to charge your adversary with dishonesty or fraud.

So, too, in cases where some such communication is necessary and proper in the protection of the defendant's interests, the privilege may be lost if the extent of its publication be excessive. I am not entitled to write to the *Times* because some one has cast a slur on me at a private meeting of the board of guardians; in fact by so doing I take the surest method of disseminating the charge against myself. So with an advertisement inserted in a newspaper, defamatory of the plaintiff; if such advertisement be necessary to protect the defendant's interest, or if advertising [* 230] was the only way of effecting the defendant's object and such object is a lawful one, then the circumstances excuse the extensive publication. But if it was not necessary to advertise at all, or if the defendant's object could have been equally well effected by an advertisement which did not contain the words defamatory of the plaintiff, then the extent given to the announcement is evidence of malice to go to the jury. (*Brown* v. *Croome*, 2 Stark. 297; and *Lay* v. *Lawson*, 4 A. & E. 795, overruling, or at least explaining *Delany* v. *Jones*, 4 Esp. 191. And see *Stockley* v. *Clement*, 4 Bing. 162; 12 Moore, 376; *Head* v. *Briscoe et ux.*, 5 C. & P. 485; *R.* v. *Enes* (1732), Andr. 229; 4 Bacon's Abr. Libel A. (2), p. 452; and *Gassett* v. *Gilbert and others*, 6 Gray (72 Mass.), 94, *ante*, p. 220.)

Illustrations.

The plaintiff, a trader, employed an auctioneer to sell off his goods, and otherwise conducted himself in such a way that his creditors reasonably concluded that he had committed an act of bankruptcy. One of them, the defendant, thereupon sent the auctioneer a notice not to pay over the proceeds of the sale to the plaintiff, "he having committed an act of bankruptcy." *Held*, by the majority of the Court of C. P. that this notice was privileged, as being made in the honest defence of defendant's own interests.

Blackham v. *Pugh*, 2 C. B. 611; 15 L. J. C. P. 290.

So where an agent in temperate language claims a right for his principal, or a solicitor for his client.

Hargrave v. *Le Breton*, 4 Burr. 2422.

Steward v. *Young*, L. R. 5 C. P. 122; 39 L. J. C. P. 85; 18 W. R. 492; 22 L. T. 168.

Even without express authority.

Watson v. *Reynolds*, Moo. & Mal. 1.

Delivery to a third person for service on the plaintiff of a statutory notice

under the Insolvent Act of 1869 (Nova Scotia) is *primâ facie* privileged, if it be made *bonâ fide* with the object of protecting defendant's rights.

Bank of British North America v. *Strong*, 1 App. Cas. 307 ; 34 L. T. 627.

The defendant had dismissed the plaintiff from his service on suspicion of theft, and, upon the plaintiff coming to his counting-house for his wages, called in two other of his servants, and addressing them in the presence of the plaintiff, said, "I have dismissed that man for robbing me: do not speak to him any more, in public or in private, or I shall think you as bad as him." *Held*, a privileged communication, on the ground that it was the duty, and also the [*231] interest, of the defendant to prevent his servants from associating with such a person.

Somerville v. *Hawkins*, 10 C. B. 583 ; 20 L. J. C. P. 131 ; 16 L. T. (Old S.) 283 ; 5 Jur. 450.

And see *Manby* v. *Witt* } 18 C. B. 544 ; 25 L. J. C. P. 294 ; 2 Jur. *Eastmead* v. *Witt* } N. S. 1004.

The occupier of a house may complain to the landlord or his agent of the workmen he has sent to repair the house.

Toogood v. *Spyring*, 1 C. M. & R. 181 ; 4 Tyrw. 582.

Kine v. *Sewell*, 3 M. & W. 297.

A customer may call and complain to a tradesman of the goods he supplies and the manner in which he conducts his business ; but he should be careful to make the complaint in the hearing of as few persons as possible, and in moderate language.

Oddy v. *Ld. Geo. Paulet*, 4 F. & F. 1009.

Crisp v. *Gill*, 29 L. T. (Old S.) 82.

An insurance company may inform a shipowner that they must refuse to insure his vessel any longer if he put a particular master in command of her.

Hamon v. *Falle*, 4 App. Cas. 247 ; 48 L. J. P. C. 45.

Defendant claimed rent of plaintiff ; plaintiff's agent told defendant that plaintiff denied his liability ; defendant thereupon wrote to the agent, alleging facts in support of his claim, and adding, "This attempt to defraud me of the produce of the land is as mean as it is dishonest." *Held* that the publication, in these terms, was not privileged, for one can claim a debt without imputing fraud, and that the judge was justified in directing the jury that it was libel.

Tuson v. *Evans*, 12 A. & E. 733.

Lord Denman, in delivering the judgment of the Court, said, "Some remark from the defendant on the refusal to pay the rent was perfectly justifiable, because his entire silence might have been construed into an acquiescence in that refusal, and so might have prejudiced his case upon any future claim ; and the defendant would, therefore, have been privileged in denying the truth of the plaintiff's statement. But, upon consideration, we are of opinion that the learned judge was quite right in considering the language actually used as not justified by the occasion. Any one, in the transaction of business with another, has a right to use language *bonâ fide*, which is relevant to that business, and which a due regard to his own interest makes necessary, even if it should directly or by its consequences, be injurious or painful to another ; and this is the principle on which privileged communication rests ; but defamatory comments on the motives or conduct of the party with whom he is dealing do not fall within that rule. It was enough for the defendant's interest, in the present case, to deny the truth of the plaintiff's assertion : to characterize that assertion as an attempt to defraud, and as mean and dishonest, was wholly unnecessary."

And see *Robertson* v. *M'Dougall*, 4 Bing. 670 ; 1 M & P. 692 ; 3 C. & P. 259.

Hancock v. *Case*, 2 F. & F. 711.

Jacob v. *Lawrence*, 4 L. R. Ir. 579 ; 14 Cox, C. C. 321.

The defendant owed the plaintiff £6 10*s.* ; the plaintiff told his attorney to write and demand the money, and threaten proceedings. The defendant in reply wrote to the attorney denouncing the proceeding as a "miserable attempt at [*232] imposition," and proceeded to discuss the plaintiff's "transactions in matters generally," asserting that "his disgusting tricks are looked upon by all respectable men with scorn." Williams, J., ruled that the letter was not

privileged, and the Court of C. P. upheld this ruling. Damages one farthing; the jury expressly found that there was no malice; but the judge certified for costs on the express ground that there was.

Huntley v. *Ward*, 1 F. & F. 552; 6 C. B. N. S. 514; 6 Jur. N. S. 18.

The defendant was clerk of the peace of the county of Kent, and as such it was his duty to have the register of county voters printed, the expense of such printing being allowed by the justices in quarter sessions. In 1854 the defendant employed a new printer, who charged less for the job; the defendant wrote a letter to the Finance Committee of the justices stating his reasons for the change, and added that to continue to pay the charges made by his former printer, the plaintiff, would be "to submit to what appears to have been an attempt to extort money by misrepresentation." *Held*, that the rest of the letter was privileged, as it was proper and necessary for the defendant to explain to the Finance Committee what he had done; but that the words imputing proper motives to the plaintiff were uncalled for and malicious. Damages £50.

Cooke v. *Wildes*, 5 E. & B. 328; 24 L. J. Q. B. 367; 1 Jur. N. S. 610; 3 C. L. R. 1090.

Defendant, having lost certain bills of exchange, published a handbill, offering a reward for their recovery, and adding that he believed they had been embezzled by his clerk. His clerk at that time still attended regularly at his office. *Held*, that the concluding words of the handbill were quite unnecessary to defendant's object, and were a gratuitous libel on the plaintiff. Damages £200.

Finden v. *Westlake*, Moo. & Malk. 461.

(v.) *Statements provoked by a previous attack by plaintiff on defendant.*

Every man has a right to defend his character against false aspersion. It may be said that this is one of the duties which he owes to himself and to his family. Therefore communications made in fair self-defence are privileged. If I am attacked in a newspaper, I may write to that paper to rebut the charges, and I may at the same time retort upon my assailant, where such retort is a necessary part of my defence or fairly arises out of the charges he has made against me. (*O'Donoghue* v. *Hussey*, Ir. R. 5 C. L. 124.) A man who himself commenced a newspaper war cannot subsequently come to the Court as plaintiff, to complain [*233] that he has had the worst of the fray. But even in rebutting an accusation, the defendant may not of course state what he knows at the time to be untrue, or intrude unnecessarily into the private life or character of his assailant. The privilege extends only to such retorts as are fairly an answer to the plaintiff's attacks. (See *post*, p. 318.) Such previous attacks may also be a matter for a counterclaim. (*Quin* v. *Hession*, 40 L. T. 70; 4 L. R. (Ir.) 35.)

Illustrations.

The plaintiff, a barrister, attacked the Bishop of Sodor and Man before the House of Keys in an argument against a private bill, imputing to the bishop improper motives in his exercise of church patronage. The bishop wrote a charge to his clergy refuting these insinuations, and sent it to the newspapers for publication. *Held*, that under the circumstances the bishop was justified in sending the charge to the newspapers, for an attack made in public required a public answer.

Laughton v. *Bishop of Sodor and Man*, L. R. 4 P. C. 495; 42 L. J.

P. C. 11; 9 Moore, P. C. C. N. S. 318; 21 W. R. 204; 28 L. T. 377.

See *Hibbs* v. *Wilkinson*, 1 F. & F. 608.

Hemmings v. *Gasson*, E. B. & E. 346; 27 L. J. Q. B. 252; 4 Jur. N. S. 834.

The defendant was a candidate for the county of Waterford. Shortly before the election the Kilkenny Tenant Farmer's Association published in *Freeman's Journal* an address to the constituency, describing the defendant as "a true type of a bad Irish landlord—the scourge of the country," and charging him with various acts of tyranny and oppression towards his tenants, and especially towards the plaintiff, one of his former tenants. The defendant thereupon published also in *Freeman's Journal* an address to the constituency, answering the charges thus brought against him, and, in so doing, necessarily libelled the plaintiff. *Held*, that such an address, being an answer to an attack, was *primâ facie* privileged.

Dwyer v. *Esmonde*, 2 L. R. (Ir.) 243, reversing the decision of the Court below; Ir. R. 11 C. L. 542.

See also *O'Donoghue* v. *Hussey*, Ir. R. 5 C. L. 124.

The plaintiff was a policy-holder in an insurance company, and published a pamphlet accusing the directors of that company of fraud. The directors published a pamphlet in reply, declaring the charges contained in the plaintiff's pamphlet to be false and calumnious, and also asserting that in a suit he had instituted he had sworn in support of these charges in opposition to his own handwriting. Cockburn, C. J., held the director's pamphlet *primâ facie* privileged, and directed the jury in the following words: "If you are of opinion that it was published *bonâ fide* for the purpose of the defence of the company, and in order to prevent these charges from operating to their prejudice, and with a view to vindicate the character of the directors, and not with a view [*234] to injure or lower the character of the plaintiff—if you are of that opinion, and think that the publication did not go beyond the occasion, then you ought to find for the defendants on the general issue." Verdict for the defendants.

Kœnig v. *Ritchie*, 3 F. & F. 413.

R. v. *Veley*, 4 F. & F. 1117.

The defendant, manager of a private lunatic asylum, unsuccessfully attempted to seize and carry off a lady, the plaintiff, whom he *bonâ fide* believed to be insane. He did so at the request of her husband, proper certificates having been obtained and all the requirements of the Lunacy Act complied with. The plaintiff, who was perfectly sane, constantly afterwards attacked him in the newspapers, challenging him to justify his conduct. Defendant at last wrote a letter in answer to these attacks and sent it to the *British Medical Journal*. Huddleston, B., held this letter privileged.

Weldon v. *Winslow*, *Times* for March 14th—19th, 1884.

Coward v. *Wellington*, 7 C. & P. 531.

At a vestry meeting called to elect fresh overseers, the plaintiff accused the defendant, one of the outgoing overseers, of neglecting the interests of the vestry, and not collecting the rates; the defendant retorted that the plaintiff had been bribed by a railway company. *Held* that the retort was a mere *tu quoque*, in no way connected with the charge made against him by the plaintiff, and was therefore not privileged; for it was not made in self-defence, but in counter-attack.

Senior v. *Medland*, 4 Jur. N. S. 1039.

And see *Huntley* v. *Ward*, 6 C. B. N. S. 514; 6 Jur. N. S. 18; 1 F. & F. 552.

Murphy v. *Halpin*, Ir. R. 8 C. L. 127.

Statements invited by the plaintiff.

Closely akin to retorts provoked by the plaintiff's own attack, are communications procured by the plaintiff's own contrivance or request. If the only publication that can be proved is one made by

the defendant in answer to an application from the plaintiff, or some agent of the plaintiff, demanding explanation, such answer, if fair and relevant, will be held privileged ; for the plaintiff brought it on himself. But this rule does not apply where there has been a previous unprivileged publication by the defendant of the same libel or slander, which causes the plaintiff's inquiry ; for in that case it is the defendant who brings it on himself.

A plaintiff is not to be allowed to entrap people into making statements to him on which he can take proceedings. And, again, [*235] if rumours are afloat prejudicial to the plaintiff which he is anxious to sift and trace to their source, all statements made *bonâ fide* to him or any agent of his in the course of the investigation are rightly protected. But it makes a great difference if the rumours originated with the defendant, so that what he has himself previously said produces the plaintiff's inquiry. (Per Lord Lyndhurst in *Smith* v. *Mathews*, 1 Moo. & Rob. 151.) If in answer to such an inquiry the defendant does no more than acknowledge having uttered the words, no action can be brought for the acknowledgment : the party injured must sue for the words previously, and use the acknowledgment as proof that those words had been spoken. But if besides saying "Yes" to the question asked, he repeats the words in the presence of a third person, asserting his belief in the accusation and that he can prove it ; such a statement is slanderous and is not privileged, although elicited by the plaintiff's question. See *Griffiths* v. *Lewis*, 7 Q. B. 61 ; 14 L. J. Q. B. 199, in which case Lord Denman remarks : "Injurious words having been uttered by the defendant respecting the plaintiff, the plaintiff was bound to make inquiry on the subject. When she did so, instead of any satisfaction from the defendant, she gets only a repetition of the slander. The real question comes to this, does the utterance of slander once give the privilege to the slanderer to utter it again whenever he is asked for an explanation ? It is the constant course, when a person hears that he has been calumniated, to go, with a witness, to the party who, he is informed, has uttered the injurious words, and to say, 'Do you mean in the presence of witnesses to persist in the charge you have made ?' And it is never wise to bring an action for slander unless some such course has been taken. But it never has been supposed, that the persisting in and repeating the calumny, in answer to such a question, which is an aggravation of the slander, can be a privileged communication ; and in none of the cases cited has it ever been so decided." And see *Richards* v. *Richards*, 2 Moo. & Rob. 557 ; *Force* v. *Warren*, 15 C. B. (N. S.) 806. If, however, the second occasion on which the words were spoken is clearly privileged and justifiable, the mere fact that defendant had previously spoken them will not of itself destroy the privilege ; the plaintiff must rely on the first utterance : that may be privileged as well or may be barred by the statute. This rule is sometimes cited as an instance of the maxim "*Volenti non fit injuria*," and is then not classed as a ground of privilege, but would rather be stated thus :—That if the only publication proved at the trial be one brought about by the plaintiff's own contrivance,

this is no sufficient evidence of publication; it is as though the only publication were to [*236] the plaintiff himself, and therefore he must be nonsuited. Such was the ruling of Lord Ellenborough in *Smith* v. *Wood*, 3 Camp. 323; but this is inconsistent with *Duke of Brunswick* v. *Harmer*, 14 Q. B. 185; and in *Warr* v. *Jolly*, 6 Car. & P. 497, it was expressly held that a communication purposely procured by the plaintiff was *privileged*.

Illustrations.

"If a servant, knowing the character which his master will give of him, procures a letter to be written, not with a fair view of inquiring the character, but to procure an answer upon which to ground an action for a libel, no action can be maintained." Per Lord Alvanley in

King v. *Waring et ux.*, 5 Esp. 15.

And see *Fonville* v. *Nease*, Dudley, S. C. 303, *ante* p. 152.

The defendant discharged the plaintiff, his servant, and when applied to by another gentleman, gave him a bad character. The plaintiff's brother-in-law, Collier, thereupon repeatedly called on the defendant to inquire why he had dismissed the plaintiff; and at last the defendant wrote to Collier stating his reasons specifically. The plaintiff sued out a writ the same day the letter was written. *Held* by Lord Mansfield, B. J., and Butler, J., that no action lay on such letter, as the defendant was evidently entrapped into writing it.

Weatherston v. *Hawkins*, 1 T. R. 110.

See also *Taylor* v. *Hawkins*, 16 Q. B. 308; 20 L. J. Q. B. 313;

R. v. *Hart*, 1 Wm. Black, 386; and the remarks of Lord Alvanley, C. J. in

Rogers v. *Clifton*, 3 B. & P. 592.

A builder employed two men, the plaintiff and Fosdyke, to repair Barton's house. Defendant on a privileged occasion had stated to the builder, "I saw the man employed by you take from Mr. Barton's house and carry away two long pieces of quartering. I hallooed to the man." Plaintiff thereupon brought Fosdyke to the defendant and said, "Is this the man? Defendant replied, "No, you are the man." *Held*, no action lay.

Kine v. *Sewell*, 3 M. & W. 297.

Amann v. *Damm*, 8 C. B. N. S. 597; 29 L. J. C. P. 313; 7 Jur. N. S. 47; 8 W. R. 470.

The defendant was asked by a friend of the plaintiff's to sign a memorial in favour of the plaintiff. He declined. The plaintiff's friend pressed him to sign and asked his reasons for declining. Thereupon defendant stated his reasons, and this statement was held a privileged communication.

Cowles v. *Potts*, 34 L. J. Q. B. 247; 11 Jur. N. S. 946; 13 W. R. 858.

Murdoch v. *Funduklian*, 2 Times L. R. 215, 614.

A friend of the plaintiff's asked defendant to act as arbitrator between the plaintiff and A. in a dispute about a horse. Defendant declined. The friend wrote again strongly urging defendant to use his influence with A. not to bring the case into court. Defendant again declined, and stated his reasons; and on this letter plaintiff brought an action. Subsequently another friend of the plaintiff's, with his knowledge and consent, wrote to defendant that she was [*237] confident he was misinformed about the plaintiff. Defendant replied that he believed A. and his servant, and not the plaintiff. On this plaintiff brought a second action of libel. *Held*, that both letters were privileged.

Whiteley v. *Adams*, 15 C. B. N. S. 392; 32 L. J. C. P. 89; 10 Jur. N. B. 470; 12 W. R. 153; 9 L. T. 483.

A witness (whom we must presume to have been an agent of the plaintiff's, though it is not so stated in the report) heard that the defendant had a copy of a libellous print, went to defendant's house, and asked to see it; the defendant thereupon produced it, and pointed out the figure of the plaintiff and the other persons caricatured. Lord Ellenborough nonsuited the plaintiff, as there was no other publication proved.

Smith v. *Wood*, 3 Camp. 323.

The plaintiff had been in partnership with his brother-in-law, Pinhorn, as a linendraper at Southampton; but gave up business and became a dissenting minister. Rumours reached his congregation that he had cheated his brother-in-law in the settlement of the accounts on his retirement from the partnership. The plaintiff challenged inquiry, and invited the malcontents in the congregation to appoint some one to thoroughly sift the matter. The malcontents appointed the defendant, and the plaintiff appointed the Rev. Robert Ainslie. *Held*, that all communications between the defendant and Ainslie relative to the matter were privileged, as being made with the sanction and concurrence of the plaintiff.

Hopwood v. *Thorn*, 8 C. B. 293; 19 L. J. C. P. 94; 14 Jur. 87.

And see *Sayer* v. *Begg*, 15 Ir. C. L. R. 458.

Remington v. *Congdon and others*, 2 Pick. (19 Mass.) 310.

Kirkpatrick v. *Eagle Lodge*, 26 Kansas, 384; 40 Amer. R. 316.

In answer to plaintiff's inquiry as to a rumour against himself, defendant told him, in the presence of a third party, what some one had said to his (defendant's) wife. There was no proof that the defendant had ever uttered a word on the subject till he was applied to by the plaintiff. *Held*, that the answer was privileged.

Warr v. *Jolly*, 6 Car. & P. 497; as explained by Lord Denman in *Griffiths* v. *Lewis*, 7 Q. B. 67; 14 L. J. Q. B. 199; 9 Jur. 370.

And see *Richards* v. *Richards*, 2 Moo. & Rob. 557.

The plaintiff called at the "Trevor Arms," and asked the landlord, in the presence of witnesses, "What do you mean by saying that I have taken sovereigns over your counter from your barmaid?" Day, J., held defendant's answer privileged.

Palmer v. *Hummerston* (1883), 1 Cababé & Ellis, 36.

The plaintiff was a builder, and contracted to build certain school-rooms at Bermondsey. The defendant started a false report, that in the building the plaintiff had used inferior timber; the report reached the plaintiff, who thereupon suspended the work, and demanded an inquiry; and the committee of the school employed defendant to survey the work and report. He reported falsely that inferior timber was used. Lord Lyndhurst directed the jury, that if they believed that the reports which produced the inquiry originated with the defendant, the defendant's report to the committee was not privileged. Verdict for the plaintiff.

Smith v. *Mathews*, 2 Moo. & Rob. 151.

[* 238] The *Weekly Dispatch* libelled the Duke of Brunswick in 1830. In 1848 the Duke sent to the office of that newspaper for a copy of the number containing the old libel, and obtained one. *Held*, that he could sue on this publication to his own agent, though all proceedings on the former publication were barred by the Statute of Limitations.

Duke of Brunswick v. *Harmer*, 14 Q. B. 185; 19 L. J. Q. B. 20; 14 Jur. 110; 3 C. & K. 10.

II. Where the defendant has an interest in the subject-matter of the communication, and the person to whom the communication is made has a corresponding interest.

In such a case every communication honestly made in order to protect such common interest is privileged by reason of the occasion.

Such common interest is generally a *pecuniary* one; as that of two customers of the same bank, two directors of the same company, two creditors of the same debtor. But it may also be *professional*, as in the case of two officers in the same corps, or masters in the

same school, anxious to preserve the dignity and reputation of the body to which they both belong. In short, it may be any interest arising from the joint exercise of any legal right or privilege, or from the joint performance of any duty imposed or recognised by the law. Thus two executors of the same will, two trustees of the same settlement, have a common interest, though not a pecuniary one, in the management of the trust estate. So the ratepayers of a parish have a common interest in the selection of fit and proper officers [* 239] to serve in the parish, their salary being paid out of the rates. So relations by blood or marriage have a common interest in their family concerns. But beyond this there is no privilege. The "common interest" must be one which the law recognises and appreciates. No privilege attaches to gossip, however interesting it may be to both speaker and hearers. (*Rumsey* v. *Webb et ux.* Car. & M. 104; 11 L. J. C. P. 129.) The law never sanctions mere vulgar curiosity or officious intermeddling in the concerns of others. To be within the privilege, the statement must be such as the occasion warrants and must be made *bonâ fide* to protect the private interests both of the speaker and of the person addressed. If in fact the defendant had no other interest in the matter beyond that which any other educated person would naturally feel, interference on his part would be officious and unprivileged. (*Botterill and another* v. *Whytehead*, 41 L. T. 588.)

Illustrations.

The defendant and Messrs. Wright and Co., his bankers, were both interested in a concern, the management of which the bankers had entrusted to the plaintiff, their solicitor. A confidential letter written by the defendant to Messrs. Wright and Co., charging the plaintiff with professional misconduct in the management of such concern was held privileged by Lord Ellenborough.

M'Dougall v. *Claridge*, 1 Camp. 267.

A creditor of the plaintiff may comment on the plaintiff's mode of conducting his business to the man who is surety to that creditor for the plaintiff's trade debts.

Dunman v. *Bigg*, 1 Camp. 269, n.

Where A. and B. have a joint interest in a matter, a letter, written by A. to induce B. to become a party to a suit relating thereto, is privileged though it may refer to the plaintiff in angry terms.

Shipley v. *Todhunter*, 7 C. & P. 680.

Klinck v. *Colby and others*, 1 Sickles (46 N. Y.) 427, *ante*, p. 224.

A creditor was appointed trustee in liquidation of the debtor's estate, the debtor continuing to manage his former business for the benefit of the estate. A letter written by the trustee to another creditor, commenting in very severe terms on the debtor's conduct, is privileged.

Spill v. *Maule*, L. R. 4 Ex. 232; 38 L. J. Ex. 138; 17 W. R. 805; 20 L. T. 675.

A person interested in the proceeds of a sale may give notice to the auctioneer [* 240] not to part with them to the plaintiff, who ordered the sale, on the ground that he has committed an act of bankruptcy.

Blackham v. *Pugh*, 2 C. B. 611; 15 L. J. C. P. 290.

So the son-in-law of a lady has sufficient interest in whom she marries to justify him in warning her not to marry the plaintiff, if he honestly believes him, however erroneously, to be of bad character.

Todd v. *Hawkins*, 8 C. & P. 88; 2 M. & Rob. 20.

Adams v. *Coleridge*, 1 Times L. R. 84.

So, too, a bishop's charge to his clergy is *primâ facie* privileged, although it contain calumniatory matter.

Laughton v. *Bishop of Sodor and Man*, L. R. 4 P. C. 495; 42 L. J. P. C. 11; 21 W. R. 204; 28 L. T. 377; 9 Moore, P. C. C. N. S. 318.

So the reports of the directors and auditors of a company printed and circulated among the shareholders are privileged.

Lawless v. *Anglo-Egyptian Cotton Co.*, L. R. 4 Q. B. 262; 10 B. & S. 226; 38 L. J. Q. B. 129; 17 W. R. 498..

A solicitor, acting for some shareholders in a company, printed and sent to the shareholders, but to no one else, a circular reflecting on the promoters and directors and inviting the shareholders to meet and discuss their position and take measures to protect their common interests. *Held*, that such publication was *primâ facie* privileged.

Quartz Hill Gold Mining Co. v. *Beall* (C. A.), 20 Ch. D. 509; 51 L. J. Ch. 874; 30 W. R. 583; 46 L. T. 746.

A caution sent by the committee of a charity to all the subscribers, warning them not to pay their subscriptions in future to the plaintiff, the former collector, who "was found unworthy of confidence, and dismissed," is *primâ facie* privileged.

Gassett v. *Gilbert and others*, 6 Gray, (72 Mass.) 94.

A communication from a firm of brewers to the tenants of their public-houses, refusing to accept any longer in payment cheques drawn on a particular bank, is *primâ facie* privileged.

Capital and Counties Bank v. *Henty and Sons* (C. A.), 5 C. P. D. 514; 49 L. J. C. P. 830; 28 W. R. 851; 43 L. T. 651; (H. L.), 7 App. Cas. 741; 52 L. J. Q. B. 232; 31 W. R. 157; 47 L. T. 662; 47 J. P. 214.

Defendant was a life governor of a public school to which the plaintiff supplied butchers' meat; defendant told the steward of the school, whose duty it was to examine the meat, that plaintiff had been known to sell bad meat. *Held* a privileged communication.

Humphreys v. *Stillwell*, 2 F & F. 590.

And see *Crisp* v. *Gill*, 29 L. T. (O. S.) 82.

Several fictitious orders for goods had been sent in the defendant's name to a tradesman, who thereupon delivered the goods to the defendant. The defendant returned the goods, and, being shown the letters ordering them, wrote to the tradesman that in his opinion the letters were in the plaintiff's handwriting. *Held*, that this expression of opinion was privileged, as both defendant and the tradesman were interested in discovering the culprit.

Croft v. *Stevens*, 7 H. & N. 570; 31 L. J. Ex. 143; 10 W. R. 272; 5 L. T. 683.

[*241] A prominent member of the church of St. Barnabas, Pimlico, went to stay in the vacation at Stockcross, in Berkshire, and so conducted himself there as to gravely offend the parishioners. Letters passing between the curate of St. Barnabas and the incumbent of Stockcross relative to the charges of misconduct brought against the plaintiff were held privileged, as both were interested in getting at the truth of the matter.

Whiteley v. *Adams*, 15 C. B. N. S. 392; 33 L. J. C. P. 89; 10 Jur. N. S. 470; 12 W. R. 153; 9 L. T. 483.

The defendant had a dispute with the Newry Mineral Water Company, which they agreed to refer to "some respectable printer who should be indifferent between the parties," as arbitrator. The manager of the company nominated the plaintiff, a printer's commercial traveller. The defendant declined to accept him as an arbitrator, and, when pressed for his reason, wrote a letter to the manager stating that the plaintiff had formerly been in the defendant's employment, and had been dismissed for drunkenness. The plaintiff thereupon brought an action on the letter as a libel concerning him in the way of his trade. *Held*, that the letter was privileged, as both parties were interested in the selection of a proper arbitrator.

Hobbs v. *Bryers*, 2 L. R. Ir. 496.

If a parish officer seeks re-election, charges made against him at the parish

meeting for the nomination of officers as to his previous conduct in the office are privileged, if made *bonâ fide*.

George v. *Goddard*, 2 F. & F. 689.
Kershaw v. *Bailey*, 1 Ex. 743; 17 L. J. Ex. 129.
See *Senior* v. *Medland*, 4 Jur. N. S. 1039.
Pierce v. *Ellis*, 6 Ir. C. L. R. 55.
Bennett v. *Barry*, 8 L. T. 857.
Harle v. *Catherall*, 14 L. T. 801.

Even though made to the wife of a voter, not to the voter himself.

Wisdom v. *Brown*, 1 Times L. R. 412.

So where the officers of any town claim to be reimbursed moneys expended by them, any statements made at a town meeting by a ratepayer are privileged, if made with the *bonâ fide* intention of showing that the expenses were not properly incurred by them in their official capacity, and so ought not to be charged on the rates.

Smith v. *Higgins*, 16 Gray (82 Mass.), 251.

A parish meeting was called to investigate the accounts of the parish constable; one ratepayer was unable to attend, so he wrote a letter to be read to the meeting concerning the constable and his accounts. This letter was held *primâ facie* privileged. For had he attended the meeting and made the same charge orally, such speech would have been privileged.

Spencer v. *Amerton*, 1 Moo. & Rob. 470.

But a personal attack on the private character of a candidate at a parliamentary election is not privileged (*ante*, p. 43).

Duncombe v. *Daniell*, 8 C. & P. 222; 2 Jur. 32; 1 W. W. & H. 101.
Sir Thomas Clarges v. *Rowe*, 3 Lev. 30.
How v. *Prin*, Holt, 652; 7 Mod. 107; 2 Salk. 694; 2 Ld. Raym. 812; 1 Brown's Parly. Cas. 64.
Onslow v. *Horne*, 3 Wils. 177; 2 W. Bl. 750.
Harwood v. *Sir J. Astley*, 1 B. & P. N. R. 47.
Pankhurst v. *Hamilton*, 3 Times L. R. 500.

[*242] A member of Parliament gave notice that he would ask in the House of Commons why the plaintiff, a colonel in the army, had been dismissed; thereupon the defendant, the plaintiff's superior officer, who had been instrumental in procuring his discharge, called on the member, whom he knew well, to explain the true facts of the case. Lord Campbell considered the occasion *primâ facie* privileged; but the jury found it was done maliciously, and awarded the plaintiff £200 damages.

Dickson v. *Earl of Wilton*, 1 F. & F. 419.

A *bonâ fide* communication between a member of Parliament and his constituents on a matter of political or local interest is privileged; such as a report of any speech of his circulated privately among his constituents for their information. Per Lord Campbell, C. J., and Crompton, J., in

Davison v. *Duncan*, 7 E. & B. 233; 26 L. J. Q. B. 107.

And Cockburn, C. J., in

Wason v. *Walter*, L. R. 4 Q. B. 95; 8 B. & S. 730; 38 L. J. Q. B. 42; 17 W. R. 169; 19 L. T. 416.

But it would be otherwise if a member of Parliament published his speech to all the world, with the malicious intention of injuring the plaintiff.

R. v. *Lord Abingdon*, 1 Esp. 226.
R. v. *Creevey*, 1 M. & S. 273.

But a judge of the Bankruptcy Court and an opposing creditor have no such common interest in the case of an insolvent debtor as to render privileged a letter written by the creditor to the judge previously to the hearing of the case. Writing such a letter is indeed a contempt of Court.

Gould v. *Hulme*, 3 C. & P. 625.

So the agents of the rival candidates at an election have no common interests, at all events after the election is over.

Dickeson v. *Hilliard and another*, L. R. 9 Ex. 79; 43 L. J. Ex. 37; 22 W. R. 372; 30 L. T. 196.

A confidential consultation between a vicar and his curate as to the course which the vicar ought to adopt in an ecclesiastical matter was held privileged in

Clark v. *Molyneux*, 3 Q. B. D. 237; 47 L. J. Q. B. 230; 26 W. R. 104; 36 L. T. 466; 37 L. T. 694; 14 Cox, C. C. 10.

And see *Bell* v. *Parke*, 10 Ir. C. L. R. 284; *ante*, p. 207.

But where a rector sent to his parishioners a circular-letter, warning them not to send their children to a school which plaintiff had opened in the parish against the rector's wishes, and in opposition to the rector's parish school, it was held that no privilege attached.

Gilpin v. *Fowler*, 9 Ex. 615; 23 L. J. Ex. 152; 18 Jur. 293.

If a clergyman or parish priest, in the course of a sermon, "make an example" of a member of his flock, by commenting on his misconduct, and either naming him or alluding to him in unmistakable terms, his words will not be privileged, although they were uttered *bonâ fide* in the honest desire to reform the culprit, and to warn the rest of his hearers, and although the congregation would probably be more interested in this part of the discourse than in any other. If the words be actionable, the clergyman must justify.

Magrath v. *Finn*, Ir. R. 11 C. L. 152.

Kinnahan v. *McCullagh*, *ib.* 1.

R. v. *Knight* (1736), Bacon's Abr. A. 2 (Libel).

[*243] And see *Greenwood* v. *Prick*, Cro. Jac. 91, as overruled by Lord Denman, 12, A. & E. 726; *ante*, p. 5.

But words spoken at a church meeting in the regular course of church discipline, with the honest intention of examining whether the plaintiff is or is not fit to be a member of the church, are held privileged in America.

Jarvis v. *Hathaway*, 3 Johns. (N. Y. Sup. Court), 178.

Remington v. *Congdon and others*, 2 Pick. (19 Mass.), 310.

York v. *Pease*, 2 Gray (68 Mass.), 282.

Kirkpatrick v. *Eagle Lodge*, 26 Kansas, 384; 40 Amer. R. 316.

Unless such words are also defamatory of some third person who is not a member of the church, when such outsider may sue.

Coombs v. *Rose*, 8 Blackford (Indiana), 155.

See in England, *R.* v. *Hart*, 1 Wm. Bl. 386.

So where the plaintiff was a member of a provincial assembly of congregational ministers, a resolution proposed at a meeting of that assembly severely censuring the plaintiff, and all speeches made thereon, are privileged; but a letter written to the assembly by a person not a member of it is not privileged.

Shurtleff v. *Stevens*, 51 Vermont, 501; 31 Amer. R. 698.

Shurtleff v. *Parker*, 130 Mass. 293; 39 Amer. R. 454.

But where a large number of persons have an interest more or less remote in the matter, defendant will not be privileged in informing them all by circular or otherwise, unless there is no other way of effecting his object. Thus in the case of most societies there is a council, or a managing committee, or a manager, or a body of trustees or directors; and communications made confidentially to them will be privileged which would not be privileged, if addressed in the first instance to the whole body of subscribers or shareholders. "Such a communication as the present (a charge against the medical officer of a poor law union) ought to be confined in the first instance to those whose duty it is to investigate the charges." (Per Mellish, L. J., in *Purcell* v. *Sowler*, 2 C. P. D. at p. 221.)

A communication can scarcely be called confidential which is addressed to some two or three hundred people at once. Thus the mere fact that I subscribe to a charity does not entitle me to canvass the private character, and discuss the private concerns, of the medical man [*244] employed by the charity, and so cause his past life to become a topic of general conversation in the town; although any representation made to the managing committee

would be privileged ; and if absolutely necessary in my opinion to the proper working of the charity, I might, after due notice given to the medical man, appeal from the decision of the committee to the general body of subscribers. (*Martin* v. *Strong*, 5 A. & E. 535, as explained in *Kine* v. *Sewell*, 3 M. & W. 297.) But if the charge I bring is one against the committee or the directors, or the majority of them, as such, I am entitled to address myself to the whole body of subscribers or shareholders at once. (*Quartz Hill Gold Mining Co.* v. *Beall* (C. A.), 20 Ch. D. 501 ; 51 L. J. Ch. 874 ; 30 W. R. 583 ; 46 L. T. 746.)

Illustrations.

A letter written by a subscriber to a charity to the committee of management of the charity concerning the conduct of their secretary in the management of the funds of the charity is *primâ facie* privileged.

Maitland v. *Bramwell*, 2 F. & F. 623.

See also *Hartwell* v. *Vesey*, 3 L. T. 275.

Any statement made by a director of a company to his fellow directors, as to the conduct and character of their auditor, is privileged, though it relates to his conduct with reference to another company, of which he was secretary and not auditor.

Harris v. *Thompson*, 13 C. B. 333.

But a statement made by one private shareholder in a company to another about a man who was formerly engineer to the company and sadly mismanaged its affairs, is not privileged.

Brooks v. *Blanshard*, 1 Cr. & Mees. 779 ; 3 Tyrw. 844.

Defendant, who was a sergeant in a volunteer corps, of which plaintiff also was a member, represented to the committee by whom the general business of the corps was conducted, that plaintiff was an unfit person to be permitted to continue a member of the corps ; that he was the executioner of the French king, &c. Lord Ellenborough held the communication privileged.

Barband v. *Hookham*, 5 Esp. 109.

See *Bell* v. *Parke*, 10 Ir. C. L. R. 284 ; 11 Ir. C. L. R. 413.

But for one member of a charitable institution to send round to all the subscribers a circular calling on them "to reject the unworthy claims of Miss Hoare," and stating that "she squandered away the money which she did obtain from the benevolent in printing circulars abusive of Commander Dickson," the secretary of the institution, is libellous, and not privileged.

Hoare v. *Silverlock* (No. 1 ; 1848), 12 Q. B. 624 ; 17 L. J. Q. B. 306 ; 12 Jur. 695.

"There may be a thousand subscribers to a charity," observes Lord Denman in *Martin* v. *Strong*, 5 Ad. & E. 538. "Such a claim of privilege is too large."

[*245] And *à fortiori*, if the words be spoken in the presence of strangers wholly uninterested in the matter, the communication loses all privilege. The defendant in all these cases must be careful that his words reach only those who are concerned to hear them. Words of admonition or of confidential advice should be given privately ; not shouted across the street, or written on postcards, or published in the newspapers. (*Wilson* v. *Collins*, 5 C. & P. 373 ; *Robinson* v. *Jones*, 4 L. R. Ir. 391.) It is true that the accidental presence of some third person will not alone take the case out of the privilege, if it was unavoidable or happened in the usual course of business affairs. But if the defendant purposely contrives that a stranger should be present, who has no right to be present, and who in the natural course of things would not be present, all privilege

is lost. (*Kershaw* v. *Bailey*, 1 Ex. 743 ; 17 L. J. Ex. 129; *Scarll* v. *Dixon*, 4 F. & F. 250.) And whenever a defendant deliberately adopts a method of communication which gives unnecessary publicity to statements defamatory of the plaintiff, the jury will be apt to suspect malice.

So, too, in making a communication which is only privileged by reason of its being made to a person interested in the subject-matter thereof, the defendant must be careful not to branch out into extraneous matter with which such person is unconcerned. The privilege only extends to that portion of the communication in respect of which the parties have a common interest or duty.

The defendant must also be careful to avoid the use of exaggerated expressions ; for the privilege may be lost by the use of violent language when it is clearly uncalled for. (*Fryer* v. *Kinnersley*, 15 C. B. N. S. 422 ; 33 L. J. C. P. 96 ; 10 Jur. N. S. 442 ; 12 W. R. 155 ; 9 L. T. 415 ; *Senior* v. *Medland*, 4 H. & N. 843 ; 4 Jur. N. S. 1039.) And especially in cases where a rumor reaches the defendant, of which he feels it his duty to inform the others who are equally interested with himself in its subject-matter, he should be very careful to report it precisely as he heard it, without [*246] any addition or exaggeration. *Bromage* v. *Prosser*, 4 B. & C. 247 ; 6 Dowl. & R. 296.)

Illustrations.

The plaintiff and defendant were jointly interested in property in Scotland, to the manager of which the defendant wrote a letter principally about the property and the conduct of the plaintiff with reference thereto, but also containing a charge against the plaintiff with reference to his conduct to his mother and aunt. *Held*, that though the part of the letter about the defendant's conduct as to the property might be confidential and privileged, such privilege could not extend to the part of the letter about the plaintiff's conduct to his mother and aunt.

Warren v. *Warren*, 1 C. M. & R. 250 ; 4 Tyr. 850.
Simmonds v. *Dunne*, Ir. R. 5 C. L. 358.

A personal attack on the private life and character of a candidate at a parliamentary election, published by a voter in the newspapers, is not privileged. "However large the privilege of electors may be,' said Lord Denman, C. J., "it is extravagant to suppose that it can justify the publication to all the world of facts injurious to a person who happens to stand in the situation of a candidate."

Duncombe v. *Daniell*, 8 C. & P. 222 ; 2 Jur. 32 ; 1 W.W. & H. 101.

Defendant made a speech at a public meeting called to petition Parliament, and subsequently handed a copy of what he had said to the reporters for publication in the newspapers ; such publication was held to be in excess of the privilege.

Pierce v. *Ellis*, 6 Ir. C. L. R. 55.

A letter sent to the newspaper by members of the town council and published therein, charging certain contractors for the erection of the borough gaol with "scamping" their work, is not privileged ; although preferring the same charge at a meeting of the town council probably would have been.

Simpson v. *Downs*, 16 L. T. 391.
But see *Harle* v. *Catherall*, 14 L. T. 801.

A shareholder in a railway company summoned a meeting of shareholders, and also invited reporters for the press to attend. Charges which he made at such meeting against one of the directors for his conduct of the affairs of the company, held *not* privileged, because persons not shareholders were present.

Parsons v. *Surgey*, 4 F. & F. 247.

But where the auditors of a company reported that the manager's accounts were badly kept, and that there was a large deficiency not accounted for; and at the general meeting this report with others was submitted to the shareholders, and the meeting resolved that they should be printed and circulated among the shareholders, which was done. *Held*, that the privilege attaching to such reports was not lost merely by the necessary publication of them to the compositors, &c., in the ordinary course of printing.

Lawless v. *Anglo-Egyptian Cotton Co.*, L. R. 4 Q. B. 262; 10 B. & S. 226; 38 L. J. Q. B. 129; 17 W. R. 498.

And see *Davis* v. *Cutbush and others*, 1 F. & F. 587.

Lake v. *King*, 1 Lev. 240; 1 Saund. 131; Sid. ; 414; 1 Mod. 58.

So with an advertisement inserted in a newspaper, defamatory of the plaintiff; if such advertisement be necessary to protect the defendant's interest, or if [*247] advertising was the only way of effecting the defendant's object, and such object is a legal one, then the circumstances excuse the extensive publication. But if it was not necessary to advertise at all, or if the defendant's object could have been equally well affected by an advertisment which did not contain the words defamatory of the plaintiff, then the extent given to the announcement is evidence of malice to go to the jury.

Brown v. *Croome*, 2 Stark. 297.

Lay v. *Lawson*, 4 A. & E. 795; overruling

Delany v. *Jones*, 4 Esp. 191.

Gassett v. *Gilbert and others*, 6 Gray (72 Mass), 94, *ante*, p. 220.

But where the members of a provincial assembly of Congregationalist ministers passed a resolution condemning the conduct of the plaintiff, one of their body, towards his congregation, and also a resolution directing that a copy of the first resolution be sent to the Congregational organs for publication, it was held in America that such publication was not too widespread, and that no action lay.

Shurtleff v. *Stevens*, 51 Vermont, 501; 31 Amer. R. 698.

And see *Oliver* v. *Bentinck*, 3 Taunt. 456.

So where the committee of a lodge of Freemasons expelled the plaintiff from the lodge, and plaintiff appealed to the Grand Lodge, the committee was held justified in printing and circulating among the members of the Grand Lodge, a pamphlet justifying their conduct, it being usual for them to report the transactions of their lodge to the Grand Lodge in that form.

Kirkpatrick v. *Eagle Lodge*, 26 Kansas, 384; 40 Amer. R. 316.

The manager and the directors of a joint stock company have a common interest in discussing the affairs of the company; but that does not justify the manager in making personal charges of fraud against the directors in a public news-room.

Waring v. *M'Caldin*, 7 Ir. C. L. R. 282.

Sewall v. *Catlin*, 3 Wendell (New York), 292.

The fact that defendant's wife was present on a privileged occasion, and heard what her husband said, will not take away the privilege, so long as her presence, though unnecessary, was not improper.

Jones v. *Thomas*, 34 W. R. 104; 53 L. T. 678; 50 J. P. 149.

Tompson v. *Dashwood*, 11 Q. B. D. 43; 52 L. J. Q. B. 425; 48 L. T. 943; 48 J. P. 55.

The defendant, the tenant of a farm, required some repairs to be done at his house; the landlord's agent sent up two workmen, one of whom was the plaintiff. They made a bad job of it; the plaintiff undoubtedly got drunk while on the premises; and the defendant was convinced from what he heard that the plaintiff had broken open his cellar-door and drunk his cider. Two days afterwards the defendant met the plaintiff and a man called Taylor, and charged the plaintiff with breaking opening his cellar-door, getting drunk, and spoiling the job. He repeated this charge later in the same day to Taylor alone in the absence of the plaintiff, and also to the landlord's agent. *Held*, that the communication to the landlord's agent was clearly privileged, as both were interested in the repairs being properly done; that the statement made to the plaintiff in Taylor's presence was also privileged, if not malicious; but that the repetition

of the statement to Taylor in the absence of the plaintiff was unauthorised and officious, and therefore not protected, although made in the belief of its truth. *Toogood* v. *Spyring*, 1 C. M. & R. 181 ; 4 Tyrw. 582.

[*248] ## III. Privileged Reports.

(i.) *Reports of Judicial Proceedings.*

Every impartial and accurate report of any proceeding in a public law court is privileged, unless the court has itself prohibited the publication, or the subject-matter of the trial be unfit for publication.

This rule applies to all proceedings in any court of justice, superior or inferior, of record or not of record. "For this purpose no distinction can be made between a court of *piepoudre* and the House of Lords sitting as a court of justice." (Per Lord Campbell in *Lewis* v. *Levy*, E. B. & E. 537 ; 27 L. J. Q. B. 287 ; 4 Jur. N. S. 970.) It is immaterial whether the proceeding be *ex parte* or not. It appears to be also immaterial whether the matter be one over which the court has jurisdiction or not, and whether it disposes of the case finally or sends it for trial to a higher tribunal.

The reason for this privilege is thus stated by Lawrence, J., in *R.* v. *Wright*, 8 T. R. 298. "The general advantage to the country in having these proceedings made public more than counterbalances the inconvenience to private persons whose conduct may be the subject of such proceedings." Cockburn, C. J., uses language almost identical in *Wason* v. *Walter*, L. C. 4 Q. B. 87 ; 8 B. & S. 730 ; 38 L. J. Q. B. 34 ; 17 W. R. 169 ; 19 L. T. 418.

It is only since 1878 that the law has extended so wide an immunity to reports of proceedings before police magistrates or justices of the peace. Thus, while *Lewis* v. *Levy* decided that a report of a preliminary investigation before a magistrate was privileged if the result was that the summons was dismissed and the person [*249] accused discharged, still *Duncan* v. *Thwaites*, 3 B. & C. 656 ; 5 D. & R. 547, is an express authority for holding such a report unprivileged, if the accused be ultimately sent to take his trial before a jury. The reason for the distinction is that in the former case the decision is final, and the investigation at an end ; in the latter the examination was preliminary merely, and the minds of the future jury might be influenced by the publication.

Again there is an obvious distinction between an *ex parte* application, where the accused has no opportunity of defending himself, and a full trial where both parties address the court by their counsel or solicitors, and call what witnesses they please. There are *dicta* of eminent judges which would seem to deny any privilege to fair and accurate reports of *ex parte* proceedings even in the superior Courts. (Per Maule, J., in *Hoare* v. *Silverlock* (No. 2, 1850), 9 C. B. 23 ; 19 L. J. C. P. 215 ; and Abbott, C. J., in *Duncan* v. *Thwaites*, 3 B. & C. 556.) But *Curry* v. *Walter*, 1 Bos. & P. 525 ; 1

Esp. 456, is an express decision that such reports *are* privileged; a case which was at one time doubted, but is now clear law. And now the decision in *Usill* v. *Hales*, *post*, p. 253, settles the law, and extends immunity to all *bonâ fide* and correct reports of all proceedings in a magistrate's court, whether *ex parte* or otherwise; and such cases as *R.* v. *Lee*, 5 Esp. 123, must be considered to be overruled, in so far at all events as they lay down any general rule to the effect that it is unlawful to publish any report of *ex parte* proceedings.

A third distinction was as to matters *coram non judice*. It might well be contended that where a magistrate listens to a slanderous complaint, and gives some advice as to a matter wholly outside his jurisdiction, he is not discharging any magisterial function nor acting in any judicial capacity. It is as though the conversation took place in his private drawing-room. And to this effect was the decision in *M'Gregor* v. *Thwaites*, 3 B. & C. 24; 4 D. & R. 695. But this decision is practically overruled by *Usill* v. *Hales*, in which case Lord Coleridge took a distiction (3 C. P. D. 324) between "inherent want of jurisdiction on account of the nature of the complaint" and "what may be called resulting want of jurisdiction because the facts do not make out the charge." His lordship assumed that the application was for a summons or order under the Masters and Workman's Act, an application, that is, which the magistrate would have had jurisdiction to grant, had the facts when investigated proved to warrant such a course. On that assumption, it follows, of course, that the magistrate had jurisdiction to listen to the application, until the facts stated to him made it clear that he had no power to grant the redress [*250] applied for. But in the libel there is no word as to the Masters and Workmen's Act; it would seem rather that the applicants were desirous of inverting the usual order of things, and of prosecuting their employer for embezzlement. No doubt in this case it was the duty of the magistrate to listen to the applicant until it became clear from what he said that the magistrate had no jurisdiction over the subject-matter of the complaint. But surely it is equally the duty of the magistrate so far to listen to every applicant. And an ordinary newspaper reporter can hardly be expected to accurately distinguish between a magistrate's "inherent want of jurisdiction" and that which is "merely resulting." Lopes, J., on the other hand, takes a broader ground:—"The cases," he says (3 C. P. D. 329), "are clear to show that want of jurisdiction will not take away the privilege, if it is maintainable on other grounds." (*Buckley* v. *Wood*, 4 Rep. 14, a; Cro. Eliz. 230; *Lake* v. *King* 1 Saund. 131; *Fairman* v. *Ives*, 5 B. & Ald. 642.) I think we may conclude that newspapers may safely report in future everything that takes place in open court, even though the magistrate should prove to have no jurisdiction.

There is nothing, however, in the case of *Usill* v. *Hales*, which expressly overrules the first distinction—that taken in *Duncan* v. *Thwaites*, 3 B. & C. 556—that a fair report of a magistrate's decision is privileged when it finally disposes of the matter of the application, but is not privileged where the inquiry is but a preliminary one, and

the prisoner is committed to take his trial at the Assizes or the Central Criminal Court. Lord Campbell in *Lewis* v. *Levy*, E. B. & E. 561 ; 27 L. J. Q. B. 290, appears anxious not to overrule *Duncan* v. *Thwaites*, on this point at all events ; for he is careful to lay down the rule that the privilege attaching to fair and correct reports of proceedings taking place in a public court of justice, extends to proceedings taking place publicly before a magistrate on the preliminary investigation of a criminal charge *terminating in the discharge by the magistrate of the party charged.*" In *Usill and Hales* the matter was *finally* disposed of by the magistrate ; it was unnecessary therefore for the Court to decide the point. But the whole spirit of the decision is against this time-honoured distinction. Lord Coleridge frankly admits (p. 325) :—" I do not doubt for my own part that if this argument had been addressed to a Court some sixty or seventy years ago, it might have met with a different result from that which it is about to meet with to-day." And then, after referring to *R.* v. *Fleet*, 1 B. & Ald. 379, and *Duncan* v. *Thwaites*, the learned judge continues :—" But we are not now living, so to say, within the shadow of those cases." And his Lordship quotes a [* 251] passage from the judgment of the Court of Queen's Bench, in the case of *Wason* v. *Walter*, L. R. 4 Q. B. 93, as "a passage which upon the whole I should desire to adopt and adhere to :— 'Whatever disadvantages attach to a system of unwritten law,— and of these we are fully sensible,—it has at least this advantage, that its elasticity enables those who administer it to adapt it to the varying conditions of society and to the requirements and habits of the age in which we live, so as to avoid the inconveniences and injustice which arise where the law is no longer in harmony with the wants and usages and interests of the generation to which it is immediately applied. Our law of libel has in many respects only gradually developed itself into anything like satisfactory and settled form. The full liberty of public writers to comment on the conduct and motives of public men has only in very recent times been recognised' . . . Even in quite recent days judges, in holding the publication of the proceedings of courts of justice lawful, have thought it necessary to distinguish what we call *ex parte* proceedings as a probable exception from the operation of the rule. Yet *ex parte* proceedings before magistrates, and even before this Court, as, for instance, on applications for criminal informations, are published every day ; but such a thing as an action or indictment founded on a report of such an *ex parte* proceeding is unheard of ; and if any such action or indictment should be brought, it would probably be held that the true criterion of the privilege is not whether the report was or was not *ex parte*, but whether it was a fair and honest report of what had taken place, published simply with a view to the information of the public, and innocent of all intention to do injury to the reputation of the party affected." (L. R. 4 Q. B. 94 ; 3 C. P. D. 326.) Applying a similar argument, we know that reports of all proceedings before magistrates are published daily with impunity, whether such proceedings are finally disposed of by the magistrate, or whether the case

is hereafter to come before a jury. Lopes, J., intimates that he thinks it doubtful how far the old authorities on this point might be followed in the present day. (3 C. P. D. 329.) In Ireland the question is practically settled by the decision of the majority of the judges in *R.* v. *Gray*, 10 Cox, C. C. 184. I think, therefore, that if it is not already the law, it soon will be the law in England also, that a newspaper reporter may report everything that occurs publicly in open court without fear of any action, provided only that his reports are fair and accurate, and not interspersed with comments of his own. "The law upon such a subject must bend to the approved usages of society, though still resting upon the same principle, that what is hurtful and indicates malice should be punished, and that [* 252] what is beneficial and *bonâ fide* should be protected." (Per Lord Campbell, C. J., in *Lewis* v. *Levy*, E. B. & E. 560; 27 L. J. Q. B. 282; 4 Jur. N. S. 970.)

Illustrations.

The following passage appeared in the *Daily News*, the *Standard*, and the *Morning Advertiser*, on the same morning:—"Three gentlemen, civil engineers, were among the applicants to the magistrate yesterday, and they applied for criminal process against Mr. Usill, a civil engineer of Great Queen Street, Westminster. The spokesman stated that they had been engaged in the survey of an Irish railway by Mr. Usill, and had not been paid what they had earned in their various capacities, although from time to time they had received small sums on account; and, as the person complained of had been paid, they considered that he had been guilty of a criminal offence in withholding their money. Mr. Woolrych said it was a matter of contract between the parties; and although, on the face of the application they had been badly treated, he must refer them to the County Court." Mr. Usill thereupon brought an action against the proprietor of each newspaper. The three actions were tried together before Cockburn, C. J., at Westminster, on November 15th, 1877. The learned judge told the jury that the only question for their consideration was whether or not the publication complained of was a fair and impartial report of what took place before the magistrate; and that, if they found that it was so, the publication was privileged. The jury found that it was a fair report of what occurred, and accordingly returned a verdict for the defendant in each case. *Held*, that the report was privileged, although the proceedings were *ex parte*, and although the magistrate decided that he had no jurisdiction over the matter.

Usill v. *Hales*
Usill v. *Brearley*
Usill v. *Clarke*
} 3 C. P. D. 319; 47 L. J. C. P. 323; 26 W. R. 371; 38 L. T. 65.

See *M'Gregor* v. *Thwaites*, 3 B. & C. 24.

A fair and accurate report in a newspaper of proceedings before a magistrate on a preliminary investigation of a charge of treason-felony is privileged, although the prisoners were ultimately committed for trial, and are awaiting trial at the moment of publication. So held in Ireland by Lefroy, C. J., and Fitzgerald and O'Brien, J.J.; *dissentiente*, Hayes, J.

Reg. v. *Gray*, 10 Cox, C. C. 184; overruling *Duncan* v. *Thwaites*, 2 B. & C. 556; 5 D. & R. 447.

A report of proceedings before a judge at chambers on an application under 5 & 6 Vict. c. 122, s. 42, to discharge a bankrupt out of custody, is privileged.

Smith v. *Scott*, 2 C. & K. 580.

The defendants presented a petition in the Croyden County Court to adjudicate the plaintiff a bankrupt; and to set aside a bill of sale which they alleged to be fraudulent. The County Court judge did not hear the case in open Court, but in his own room; the public, however, could walk in and out of

the room at their pleasure during the hearing. *Held*, by Cockburn, C. J., at Nisi Prius, that a fair report of what took place before the County Court judge in his room was *primâ facie* privileged.

Myers v. *Defries, Times*, July 23d, 1877.

[*253] Proceedings held in gaol before a registrar in bankruptcy, under the Bankruptcy Act, 1861, ss. 101, 102, upon the examination of a debtor in custody, are judicial and in a public Court. A fair report, therefore, of those proceedings is protected.

Ryalls v. *Leader and others*, L. R. 1 Ex. 296 ; 12 Jur. N. S. 503 ; 4 H. & C. 555 ; 35 L. J. Ex. 185 ; 14 W. R. 838 ; 14 L. T. 563.

A fair and accurate report of proceedings before the examiners appointed under 9 Geo. 4, c. 22, s. 7, to inquire into the sufficiency of the sureties offered on the trial of an election petition, was held privileged.

Cooper v. *Lawson*, 8 A. & E. 746 ; 1 W. W. & H. 601 ; 2 Jur. 919 ; 1 P. & D. 15.

But Patteson, J., held that a report of what had occurred at the town-hall at Ludlow on the occasion of one of his Majesty's commissioners of inquiry going to Ludlow to inquire into the state of that corporation, was not privileged.

Charlton v. *Watton*, 6 C. & P. 385.

A conversation took place between a coroner, his officer, and the widow of the deceased in the room in which the inquest was about to be held, after reporters and the coroner had entered and taken their seats there, but before the jury had been sworn. The officer complained that the body had been improperly removed from the hospital ; the widow complained of the manner in which she had been served with the summons to the inquest. *Held*, per Bowen, J., that a fair report of such conversation was privileged.

Sheppard v. *Lloyd, Daily Chronicle* for March 11th, 1882.

But no privilege attaches to the report of unsworn statements made by a mere bystander at an inquest.

Lynam v. *Goring*, 6 L. R. Ir. 259.

In Scotland there exists a public register of protested bills of exchange, established by statute, and the registration of such protests has by statute the effect of a "decreet," or final judgment of the Court of Session. The contents of this register being public property, the defendant published an accurate transcript thereof for the benefit of merchants. This was held privileged, as being but a list of judgments of the Court.

Fleming v. *Newton*, 1 H. L. C. 363.

But where the publisher of such a "Black List" left in it, as a still existing liability, a judgment which had been annulled and satisfied by payment, the Irish Court of Queen's Bench held that this inaccuracy destroyed all privilege.

McNally v. *Oldham*, 16 Ir. C. L. R. 298 ; 8 L. T. 604.

And see *Jones* v. *McGorern*, Ir. R. 1 C. L. 681.

Cosgrave v. *Trade Auxiliary Co.*, Ir. R. 8 C. L. 349.

There are, however, two cases in which reports of judicial proceedings, although fair and accurate, are not privileged, and are indeed illegal.

(i.) The first is where the Court has itself prohibited the publication, as it frequently did in former days. "Every court has the power of preventing the publication of its [* 254] proceedings pending litigation." (Per Turner, L. J., in *Brook* v. *Evans*, 29 L. J. Ch. 616 ; 6 Jur. N. S. 1025 ; 8 W. R. 688.) But such a prohibition now is rare. (And see *Levy* v. *Lawson*, E. B. & E. 560 ; 27 L. J. Q. B. 282.)

(ii.) The second is where the subject-matter of the trial is an obscene or blasphemous libel, or where for any other reason the proceedings are unfit for publication. It is not justifiable to publish even a fair and accurate report of such proceedings ; such a

report will be indictable as a criminal libel. (See *Re "Evening News,"* 3 Times L. R. 255.)

Illustrations.

On the trial of Thistlewood and others for treason, in 1820, Abbott, C. J., announced in open Court that he prohibited the publication of any of the proceedings until the trial of all the prisoners should be concluded. In spite of this prohibition, the *Observer* published a report of the trial of the first two prisoners tried. The proprietor of the *Observer* was summoned for the contempt, and failing to appear, was fined £500.

R. v. *Clement*, 4 B. & Ald. 218.

Richard Carlile on his trial read over to the jury the whole of Paine's "Age of Reason," for selling which he was indicted. After his conviction, his wife published a full, true, and accurate account of his trial, entitled "The Mock Trial of Mr. Carlile," and in so doing republished the whole of the "Age of Reason" as a part of the proceedings at the trial. *Held*, that the privilege usually attaching to fair reports of judicial proceedings did not extend to such a colourable reproduction of a blasphemous book; and that it is unlawful to publish even a correct account of the proceedings in a court of justice, if such an account contains matter of a scandalous, blasphemous, or indecent nature.

R. v. *Mary Carlile* (1819), 3 B. & Ald. 167. See also the remarks of Bayley, J., in

R. v. *Creevey*, 1 M. & S. 281.

The Protestant Electoral Union published a book, called "The Confessional Unmasked," intended to show the pernicious influence exercised by Roman Catholic priests in the confessional over the minds and consciences of the laity. This was condemned as obscene in *R.* v. *Hicklin*, L. R. 3 Q. B. 360; 37 L. J. M. C. 89; 16 W. R. 801; 18 L. T. 395; 11 Cox, C. C. 19. The Union thereupon issued an expurgated edition, for selling which one George Mackey was tried at the Winchester Quarter Sessions on October 19th, 1870, when the jury, being unable to agree as to the obscenity of the book, were discharged without giving any verdict. The Union thereupon published "A Report of the Trial of George Mackey," in which they set out the full text of the second edition of "The Confessional Unmasked," although it had not been read in open Court, but only taken as read, and certain passages in it referred to. A police magistrate thereupon ordered all copies of this "Report of the Trial of George Mackey" [* 255] to be seized and destroyed as obscene books. *Held*, that this decision was correct.

Steele v. *Brannan*, L. R. 7 C. P. 261; 41 L. J. M. C. 85; 20 W. R. 607; 26 L. T. 509.

The report must be an impartial and accurate account of what really occurred at the trial; else no privilege will attach. It is the duty of the judge to exclude irrelevant evidence; if therefore such evidence be given in Court and appear in the report, this is not the fault of the reporter. (*Ryalls* v. *Leader*, L. R. 1 Ex. 300; 35 L. J. Ex. 185; 14 W. R. 838; 12 Jur. N. S. 503; 14 L. T. 563.) The sworn evidence of the witnesses should be relied on, rather than the speeches of advocates. Counsel are frequently instructed to open to the jury facts which they fail to prove in evidence. If such an unsubstantiated statement be reported at all, the reporter should add, "but this the plaintiff failed to prove" but it would be better to avoid all allusion to the matter. Especial care should be taken to report accurately the summing-up of the learned judge, especially if the case be of more than transitory interest. In many cases a report has escaped the charge of partiality on the ground that it contained an accurate report of the judge's summing-up of the case

to the jury. (*Milissich* v. *Lloyds*, 46 L. J. C. P. 404 ; 36 L. T. 424 ; *Chalmers* v. *Payne*, 2 C. M. & R. 156 ; 5 Tyrw. 766 ; 1 Gale, 69.)

Of course the report need not be *verbatim ;* it may be abridged or condensed ; but it must not be partial or garbled. It need not state all that occurred *in extenso ;* but if it omit any fact which would have told in the plaintiff's favour, it will be a question for the jury whether the omission is material. Thus the entire suppression of the evidence of one witness may render the report unfair. (*Duncan* v. *Thwaites*, 3 B. & C. 580.) But a report will be privileged if it is "*substantially* a fair account of what took place" in Court. (Per Lord Campbell, C. J., in *Andrews* v. *Chapman*, 3 C. & K. 289.) "It is sufficient to publish a fair abstract." (Per Mellish, L. J., in *Milissich* v. *Lloyds*, [*256] 46 L. J. C. P. 405 ; per Byles, J., in *Turner* v. *Sullivan and others*, 6 L. T. 130.)

The privilege is not confined to reports in a newspaper or law magazine. It attaches equally to fair and accurate reports issued for any lawful reason in pamphlet form or in any other fashion. Though, of course, if there be any other evidence of malice, the mode and extent of publication will be taken into consideration with such other evidence on that issue. (*Milissich* v. *Lloyds*, 46 L. J. C. P. 404 ; *Salmon* v. *Isaac*, 20 L. T. 885 ; *Riddell* v. *Clydesdale Horse Society*, 12 Ct. of Session Cases, 4th Series, 976.)

Nor does it matter by whom the report is published ; the privilege is the same, as a matter of law, for a private individual as for a newspaper. (Per Brett, L. J., 46 L. J. C. P. 407.) "I do not think the public press has any peculiar privilege." (Per Bramwell, L. J., 5 Ex. D. 56.) "A newspaper has no greater privilege in such a matter than any ordinary person—any person is privileged publishing such a report if he does so merely to inform the public." (Per Hannen, J., in *Salmon* v. *Isaac*, 20 L. T. at p. 886 ; and see 3 Times L. R. 245.)

Illustrations.

In a former action for libel brought by the plaintiff, the then defendant had justified. The report of this trial set out the libel in full, and gave the evidence for the defendant on the justification, concluding, however, by stating that the plaintiff had a verdict for £30. The jury, under the direction of Lord Abinger, took the "bane" and the "antidote" together, and found a verdict for the defendant, on the ground that the report when taken altogether was not injurious to the plaintiff. And the Court refused a rule for a new trial.

Chalmers v. *Payne*, 5 Tyrw. 766 ; 1 Gale, 69 ; 2 C. M. & R. 153.
Dicas v. *Lawson*, *ib.*

The plaintiff and M. were convicted of a conspiracy to extort money from B.; the report of the trial stated that the plaintiff had written a particular letter, which the plaintiff contended had not in fact been written by him, but by his fellow-conspirator, M. *Held*, that as the jury had convicted them of a common purpose, and the letter was written in furtherance of that common purpose and set out in the indictment as an overt act of the conspiracy, it made no difference which of the two wrote it ; and that the error, if error it were, was immaterial.

Stockdale v. *Tarte and others*, 4 A. & E. 1016.
Alexander v. *N. E. R. Co.*, 6 B. & S. 340 ; 34 L. J. Q. B. 152 ; 13 W. R. 651 ; 11 Jur. N. S. 619.

[*257] A barrister, editing a book on the Law of Attorneys, referred to a case *Re Blake*, as reported in 30 L. J. Q. B 32, and stated that Mr. Blake was struck off the rolls for misconduct. He was in fact only suspended for two

years, as appeared from the *Law Journal* report. The publishers were held liable for this carelessness, although of course neither they nor the writer bore Mr. Blake any malice. Damages £100.

Blake v. *Stevens and others*, 4 F. & F. 222 : 11 L. T. 543.
Gwynn v. *S. E. R. Co.*, 18 L. T. 738.
R. v. *Lofield*, 2 Barnard. 128.

Where the report of a trial gave none of the evidence, but only an abridgment of the speeches of counsel, and the defendant pleaded that it was still in substance a true report of the trial; such plea was held bad on demurrer.

Flint v. *Pike*, 4 B. & Cr. 473 : 6 D. & R. 528.
Kane v *Mulcany*, Ir. R. 2 C. L. 402.

A report is not privileged which does not give the evidence, but merely sets out the circumstances "as stated by the counsel" for one party.

Saunders v *Mills*, 6 Bing. 213 ; 3 M. & P. 520.
Woodgate v. *Ridout*, 4 F. & F. 202.

Still less will it be privileged, if after so stating the case the only account given of the evidence is that the witnesses "proved all that had been stated by the counsel for the prosecution."

Lewis v. *Walter*, 4 B. & Ald. 605.

The *Morning Post*, in reporting proceedings taken against the plaintiff in the Westminster Police Court, stated that certain facts "appeared from the evidence." No evidence had in fact been given of them ; but they had been stated in the opening of the solicitor for the prosecution. On these facts, Lord Coleridge, C. J., directed the jury to find for the defendant. But the Divisional Court granted a new trial on the ground that there was a substantial discrepancy between the report and what really occurred, and that the question should therefore have been left to the jury whether the report was a fair one ; and this decision was affirmed on appeal,

Ashmore v. *Borthwick*, 49 J. P. 792 ; 2 Times L. R. 113, 209.

Where a report in the *Times* of a preliminary investigation before a magistrate set out at length the opening of the counsel for the prosecution, but entirely omitted the examination and cross-examination of the prosecutor, the only witness, merely saying that "his testimony supported the statement of his counsel" the jury found a verdict for the plaintiff. Damages £10.

Pinero v. *Goodlake*, 15 L. T. 676.

[N.B.—The headnote to this case is strangely misleading : the proceedings were not *ex parte* ; the defendant, himself a solicitor, was present and cross-examined the witnesses. The important monosyllable "no" appears to be omitted in the report of the argument of Coleridge, Q. C., p. 677.]

The mother of a lady, who was dead and buried, applied to the coroner on affidavits for an order that the body might be exhumed : the affidavits imputed that she had been murdered by her husband. Thereupon the coroner issued his warrant for exhumation. A newspaper reported this fact, and proceeded to state the contents of these affidavits in a sensational paragraph, commencing "From inquiries made by our reporter it appears that the deceased," &c. The [* 258] reporter had made no inquiries ; he had merely copied the affidavits. He was convicted and fined £50.

R. v. *Andrew Gray*, 26 J. P. 663.

Where the report of a criminal trial gave the speech for the prosecution, a brief *resumé* of the speech of the prisoner's counsel, who called no witnesses, and the whole of the Lord Chief Baron's summing up *in extenso* ; but it did not give the evidence except in so far as it was detailed in the judge's summing up ; Lord Coleridge, C. J., held the report necessarily unfair because incomplete, and refused to leave the question of fairness to the jury. But the Court of Appeal held that he was wrong in so doing ; that it is sufficient to publish a fair abstract of the trial, and that the judge's summing up was presumably such an abstract ; that the question of fairness must be left to the jury, and that therefore there must be a new trial.

Milissich v. *Lloyds* (C. A.), 46 L. J. C. P. 404 ; 36 L. T. 432 ; 13 Cox, C. C. 575.

An accurate report of a portion of a judicial proceeding will still be privileged, if it does not purport to be a report of the whole. Thus, where a trial lasts more than one day, reports published in the newspapers each morning are protected. Where a man publishes a portion only, when it is in his power to publish the whole, this fragmentary publication will be evidence of malice, if the part selected and published tell more against the plaintiff than a report of the whole trial would have done, *e.g.*, if the opening speech of one counsel or the evidence on one side only were published after the trial was over. But the judgment or summing up of the learned judge may always be separately published; for it is a distinct part of the proceedings, not affected by any other, complete in itself and fairly severable from the rest; it is also presumably a fair summary of the whole proceedings. (*Milissich* v. *Lloyds* (C. A.), 46 L. J. C. P. 404; 36 L. T. 423; 13 Cox, C. C. 575.)

Illustrations.

Where judicial proceedings last more than one day, and their publication is not expressly forbidden by the Court, a report published in a newspaper every morning of the proceedings of the preceding day, is privileged, if fair and accurate; but all comment on the case must be suspended till the proceedings terminate.

Lewis v. *Levy*, E. B. & E. 537; 27 L. J. Q. B. 282; 4 Jur. N. S. 970.

[*259] The sentence of a court martial may be read at the head of every regiment. Per Heath, J., in

Oliver v. *Bentinck*, 3 Taunt. at p. 459.

The plaintiff had sued defendants in the Chancery Division, and the action was dismissed with costs. Defendants thereupon published, in the form of a pamphlet, a *verbatim* report of the whole judgment, taken from the shorthand writer's notes, but omitting all the evidence and speeches on either side. The jury having negatived malice, the Court of Appeal held the pamphlet privileged.

MacDougall v. *Knight & Son* (C. A.), 17 Q. B. D. 636; 55 L. J. Q. B. 464; 34 W. R. 727; 55 L. T. 274.

A weekly paper stated, on December 21st, 1884, that plaintiff had been brought up at the Nottingham Police Court on the preceding Monday (15th) and charged with obtaining money on false pretences, and that "a number of other charges will be brought against him." It omitted all mention of the fact that plaintiff had been brought up again on remand on the preceding Thursday (18th) and triumphantly discharged. The jury awarded the plaintiff £45 in addition to the £5 which defendant had paid into Court under Lord Campbell's Act.

Grimwade v. *Dicks and others*, 2 Times L. R. 627.

Where the plaintiff in a trade-mark case failed on all points but one, and afterwards published a "caution" to the trade, which stated the effect of the judgment accurately so far as it was in his favour, but omitted all allusion to the parts of the subject in defendant's favour, North, J., held the report unfair, and granted an injunction restraining its circulation.

Hayward & Co. v. *Hayward & Sons*, 34 Ch. D. 198; 56 L. J. Ch. 287; 35 W. R. 392; 55 L. T. 729.

The reporter must add nothing of his own. He must not state his opinion of the conduct of the parties, or impute motives therefor: above all, he must not insinuate that a particular witness committed perjury. That is not a report of what occurred; it is

the comment of the writer on what occurred, and to this no privilege attaches. Often no doubt such comments may be justified on another ground, that they are fair and *bonâ fide* criticism on a matter of public interest and are therefore not libellous. (See *ante*, c. II. pp. 32–52.) But such observations, to which quite different considerations apply, should not be mixed up with the history of the case. "If any comments are made, they should not be made as part of the report. The report should be confined to what takes place in Court, and the two things, report and comment, should be kept separated." (Per Lord Campbell, C. J., in *Andrews* v. [*260] *Chapman*, 3 C. & K. 288.) And all sensational headings to reports should be avoided.

Illustrations.

The captain of a vessel was charged before a magistrate with an indecent assault upon a lady on board his own ship. The defendant's newspaper published a report of the case, interspersed with comments which assumed the guilt of the captain, commended the conduct of the lady, and generally tended to inflame the minds of the public violently against the accused. *Held*, that no privilege attached to such comments and that the report was neither fair nor dispassionate.

R. v. *Fisher and others*, 2 Camp. 563.

And see *R.* v. *Lee*, 5 Esp. 123.

R. v. *Fleet*, 1 B. & Ald. 379.

It is libellous to publish a highly-coloured account of criminal proceedings, mixed with the reporter's own observations and conclusions upon what passed in court, headed "Judicial Delinquency," and containing an insinuation that the plaintiff ("our hero") had committed perjury: and it is no justification to pick out such parts of the libel as contain an account of the trial, and to plead that such parts are true and accurate, leaving the extraneous matter altogether unjustified.

Stiles v. *Nokes*, 7 East, 493; same case *sub nomine Carr* v. *Jones*, 3 Smith, 491.

The report of a trial set out the speech for the counsel for the prosecution, and then added:—"The first witness was R. P., who proved all that had been stated by the counsel for the prosecution:" but owing to the absence of a piece of formal evidence in no way bearing on the merits of the case, "the jury, under the direction of the learned judge, were obliged to give a verdict of acquittal, to the great regret of a crowded court, on whom the statement and the evidence, so far as it went, made a strong impression of their guilt." *Held*, that no privilege applied.

Lewis v. *Walter*, 4 B. & Ald. 605.

Roberts v. *Brown*, 10 Bing. 519; 4 Moo. & Sc. 407.

On an examination into the sufficiency of sureties on an election petition, under 9 Geo. IV. c. 22, s. 7, affidavits were put in to show that one of them (the plaintiff) was embarrassed in his affairs, and an insufficient surety. A newspaper report of the examination proceeded to ask why the plaintiff, being wholly unconnected with the borough, should take so much trouble about the matter. "There can be but one answer to these very natural and reasonable queries, *he is hired* for the occasion." *Held*, that this question and answer formed no part of the report; and therefore enjoyed no privilege; and that it was properly left to the jury to say whether they were a fair and *bonâ fide* comment on a matter of public interest in that borough. Verdict for the plaintiff. Damages £100.

Cooper v. *Lawson*, 8 A. & E. 746; 1 W. W. & H. 601; 2 Jur. 919; 1 P. & D. 15.

The *Observer* gave a true and faithful account of some proceedings in the Insolvent Debtors Court, but headed it with the words "Shameful conduct of [*261] an attorney." *Held*, that for those words, as they were not justified, the plaintiff was entitled to recover.

Clement v. *Lewis*, (Exch. Ch.), 3 Br. & B. 297; 3 B. & Ald. 702; 7 Moore, 200.

Bishop v. *Latimer*, 4 L. T. 775.

A paragraph was headed "An Honest Lawyer," and stated that the plaintiff had been reprimanded by one of the masters of the Queen's Bench "for what is called sharp practice in his profession." *Held*, libellous.

Boydell v. *Jones*, 4 M. & W. 446; 1 H. & H. 408; 7 Dowl. 210.

Flint v. *Pike*, 4 B. & C. 473; 6 D. & R. 528.

A report of the hearing of a charge of perjury before a magistrate was headed "Wilful and Corrupt Perjury," and stated that the "evidence before the magistrate entirely negatived the story of the" plaintiff. The jury found a verdict for the defendant, on the ground that it was a fair and correct report of what occurred at the hearing. But the Court set aside the verdict on this count, and entered a verdict for the plaintiff with nominal damages.

Lewis v. *Levy*, E. B. & E. 537; 27 L. J. Q. B. 282; 4 Jur. N. S. 970.

The law is the same in America.

Thomas v. *Croswell*, 7 Johns. (N. Y. Supr. Court) 264.

Commonwealth v. *Blanding*, 3 Pick. (20 Mass.) 304.

The privilege attaching to fair and accurate reports may be rebutted by proof of actual malice. Reports of judicial proceedings are not absolutely privileged, by whomsoever published. (*Stevens* v. *Sampson*, 5 Ex. D. 53; 49 L. J. Q. B. 120.) But it is of course very difficult to prove that an ordinary newspaper reporter has been actuated by malice: whereas if one of the parties to a cause or his solicitor sent the report, the jury would probably start with a presumption that the report was biassed and unfair. (See the remarks of Wood, V. C., in *Coleman* v. *West Hartlepool Harbour and Railway Co.*, 2 L. T. 766; 8 W. R. 734.)

Illustrations.

A churchwarden obtained a writ of prohibition against the Bishop of Chichester on an affidavit which falsely stated the facts. He immediately had the writ translated into English, and dispersed 2,000 copies of such translation all over the kingdom, with a title-page alleging that by such writ "the illegality of oaths is declared," which was not the case. *Held*, "a most seditious libel."

Waterfield v. *Bishop of Chichester*, 2 Mod. 118.

[*262] Defendant published, in the form of a circular, headed "Take notice. Important to Farmers," a fairly accurate report of two actions brought by the plaintiff in the Ashford County Court to recover the price of manures he had sold. These circulars were extensively distributed on market days in the home and adjoining counties, and plaintiff's business consequently fell off. The jury considered that the defendant published it with a view of injuring the plaintiff. Damages £287.

Salmon v. *Isaac*, 20 L. T. 885.

In a County Court action, *Nettlefold* v. *Fulcher*, the defendant, a solicitor, appeared for Nettlefold, and commented severely on the conduct of the plaintiff, who was Fulcher's agent and debt collector. The defendant sent to the local newspapers a report of the case, which the jury found "was in substance a fair report;" but they also found that "it was sent with a certain amount of malice." Verdict for the plaintiff. Damages 40*s*. On appeal, it was argued that the defendant was entitled to judgment on the first finding of the jury, and that the motive which the defendant had in sending the report was immaterial. But the Court of Appeal held that Cockburn, C. J., was right in directing judgment to be entered for the plaintiff.

Stevens v. *Sampson*, 5 Ex. D. 53; 49 L. J. Q. B. 120; 28 W. R. 87; 41 L. T. 782.

Plaintiff brought an action against defendant, and applied for an injunction. Defendant applied at the same time for a receiver, which was refused. There-

upon defendant said that he would "make it d——d hot for Dodson," and inserted in a newspaper he owned a report of the application, setting out all his own counsel had said against the plaintiff's solvency, &c., at full length, but omitting all mention of plaintiff's affidavit. *Held*, ample evidence of malice. Damages £250.

Dodson v. *Owen*, 2 Times L. R. 111.

The defendants presented a petition in the Croydon County Court to adjudicate the plaintiff a bankrupt, and to set aside a bill of sale which they alleged to be fraudulent. The County Court judge heard the case in his own room, where no reporters were present, and decided that the bill of sale was fraudulent. After the case was over, the defendants sent for a reporter to the Greyhound Hotel, and gave him an account of the proceedings before the County Court judge, from which he drew up a report, which appeared in several papers. The jury found that the report was "fair as far as it went;" but it did not state the fact that the plaintiff had announced his intention to appeal. *Held*, that neither this omission, nor the fact that the report was furnished by one of the parties, instead of being taken by the reporter in the usual way, was, by itself, sufficient to destroy the privilege attaching to all fair reports of legal proceedings. (Per Cockburn, C. J., at Nisi Prius, *Myers* v. *Defries*, Times, July 23rd, 1877.) But the jury being satisfied from the whole circumstances that the defendants furnished the report with the express intention of injuring the plaintiff, gave the plaintiff £250 damages on the first trial, and one farthing damages on the second.

Meyers v. *Defries*, 4 Ex. D. 176; 5 Ex. D. 15, 180; 48 L. J. Ex. 446; 28 W. R. 406; 40 L. T. 795; 41 L. T. 659.

And see *Saxby* v. *Easterbrook*, 3 C. P. D. 339; 27 W. R. 188.

[*263] Hence in these cases there may be two distinct questions for the jury:—(i.) Is the report fair and accurate? If so, it is *primâ facie* privileged; if not, verdict for the plaintiff. (ii.) Was the report, though fair and accurate, published maliciously? Was it published solely to afford information to the public and for the benefit of society, without any reference to the individuals concerned; or was it published with the malicious intention of injuring the reputation of the plaintiff? The second question of course only arises when the first has been already answered in the affirmative.

And, of course, there is in each case the previous question for the judge, "Is there any evidence to go to the jury of inaccuracy or of malice?" Where there is no suggestion of malice and no evidence on which a reasonable man could find that the report is not absolutely fair, the judge should stop the case and direct a verdict for the defendant: *e. g.* where the report is *verbatim* or nearly so; or corresponds in all material particulars with a report taken by an impartial shorthand writer. (Per Brett, L. J., in *Milissich* v. *Lloyds*, 46 L. J. C. P. 407.) But if anything be omitted in the report which could make any appreciable difference in the plaintiff's favour, or anything erroneously inserted which could conceivably tell against him, then it is a question for the jury whether such deviation from absolute accuracy makes the report unfair; and the judge at Nisi Prius should not direct a verdict for either party. (*Risk Allah Bey* v. *Whitehurst and others*, 18 L. T. 615; *Street* v. *Licensed Victuallers Society*, 22 W. R. 553; *Ashmore* v. *Borthwick*, 49 J. P. 792; 2 Times L. R. 113, 209; *ante*, p. 257.)

The jury in considering the question should not dwell too much on isolated passages: they should consider the report as a whole. They should ask themselves what impression would be made on the

mind of an unprejudiced reader who reads the report straight through knowing nothing about the case beforehand. Slight errors may easily occur ; and if such errors do not substantially alter the impression of the matter which the ordinary reader would receive, the jury should find for the defendant. (*Stockdale* v. *Tarte and others*, 4 A. & E. 1016 ; *ante*, p. 256.) If, however, there is a substantial misstatement of any material fact, and such misstatement is prejudicial to the reputation of the plaintiff, then the report is unfair and inaccurate, and the jury should find for the plaintiff.

[*234] (ii) *Reports of Parliamentary Proceedings.*

Every fair and accurate report of any proceeding in either House of Parliament, or in any committee thereof, is privileged, even though it contain matter defamatory of an individual.

The analogy between such reports and those of legal proceedings is complete. Whatever would deprive a report of a trial of immunity, will equally deprive a report of parliamentary proceedings of all privilege.

There was for a long time great doubt on this subject, but the law is now clearly and most satisfactorily settled by the decision in *Wason* v. *Walter*, L. R. 4 Q. B. 73; 38 L. J. Q. B. 34; 17 W. R. 169; 19 L. T. 409. Such doubt was caused by the fact that there were Standing Orders of both Houses of Parliament prohibiting such publications ; and it was argued with some force that no privilege could attach to any report which was published in contravention of such Standing Orders, and was therefore in itself a contempt of the House. We have seen (*ante*, p. 254) that when a learned judge expressly prohibits the publication of the proceedings before him, any report of them is a contempt and wholly unprivileged. (*R.* v. *Clement*, 4 B. & Ald. 218.) And the earliest reports of parliamentary proceedings were only published in fear and trembling as "Debates in the Senate of Lilliput," with the names of the speakers disguised. And even for such reports Cave, the editor of the *Gentleman's Magazine*, was cited before the House of Lords for breach of privilege (April, 1747) ; and Johnson's pen ceased to indite ponderous speeches for "Whig dogs." But in 1749, Cave began again, and his reports now took the form of letters from an M. P. to a friend in the country. After 1752 they were avowedly printed as reports ; but still only the initials of the speakers were given. As late as 1801 the printer and publishers of the *Morning Herald* were committed to the custody of Black Rod, for publishing an account of a debate in the House of Lords ; but then such an account was expressly declared to be "a scandalous misrepresentation" of what had really occurred. And now such Standing Orders are quite obsolete.

[*265] A speech made by a member of Parliament in the House is of course absolutely privileged. If he subsequently causes his speech to be printed, and circulates it privately among his constit-

uents, *bonâ fide* for their information on any matter of general or local interest, a qualified privilege would attach to such report; [although such publication is expressly forbidden by an obsolete order of the House of Commons, passed in 1641 and still a Standing Order of the House; 2 Commons' Journal, 209]. (Per Lord Campbell, C. J., and Crompton, J., in *Davison* v. *Duncan*, 7 E. & B. 233; 26 L. J. Q. B. 107; and Cockburn, C. J., in *Wason* v. *Walter*, L. R. 4 Q. B. 95; 38 L. J. Q. B. 42; 19 L. T. 416.) But if a member of Parliament publishes his speech to all the world, with the malicious intention of injuring the plaintiff, he will be liable both civilly and criminally. (*R.* v. *Lord Abingdon*, 1 Esp. 226; *R.* v. *Creevey*, 1 M. & S. 273.)

Illustrations.

The defendant published the report of a select committee of the House of Commons, which contained a paragraph charging an individual with holding views hostile to the government. But the Court refused to grant a criminal information, on the express ground that the publication was a true copy of a proceeding in Parliament.

R. v. *Wright* (1799), 8 T. R. 293.

The plaintiff induced Earl Russell to present a petition to the House of Lords, charging a high judicial officer with having suppressed evidence before an election committee some thirty years previously. The charge was shown to be wholly unfounded, and the conduct of the plaintiff in presenting such a petition was severely commented on by the Earl of Derby and others in the debate which followed. The plaintiff sued the proprietor of the *Times* for reporting this debate. Cockburn, C. J., directed the jury, that if they were satisfied that the report was faithful and correct, it was in point of law a privileged communication; and the Court of Queen's Bench subsequently discharged a rule *nisi* which had been obtained for a new trial on the ground of misdirection.

Wason v. *Walter*, L. R. 4 Q. B. 73; 8 B. & S. 671; 38 L. J. Q. B. 34; 17 W. R. 169; 19 L. T. 409.

The proceedings of any committee of the House of Lords may be reported and commented on.

Kane v. *Mulvany*, Ir. L. R. 2 C. L. 402.

[*236] (iii.) *Other Reports.*

By the Newspaper Libel and Registration Act, 1881 (44 & 45 Vict. c. 60), s. 2, "Any report published in any newspaper of the proceedings of a public meeting shall be privileged, if such meeting was lawfully convened for a lawful purpose and open to the public, and if such report was fair and accurate, and published without malice, and if the publication of the matter complained of was for the public benefit: provided always, that the protection intended to be afforded by this section shall not be available as a defence in any proceeding, if the plaintiff or prosecutor can show that the defendant has refused to insert in the newspaper in which the report containing the matter complained of appeared a reasonable letter or statement of explanation or contradiction by or on behalf of such plaintiff or prosecutor."

No other reports are privileged. If any one publishes an account of the proceedings of any meeting of a town-council, board of guardians, or vestry, of the shareholders in any company, of the

subscribers to any charity, or of any public meeting, political or otherwise, and such account contains expressions defamatory of the plaintiff, the fact that it is a fair and accurate report of what actually occurred will not avail as a defence, though it may be urged in mitigation of damages; unless the case comes within the above section. By printing and publishing the statements of the various speakers, he has made them his own; and must either justify and prove them strictly true, or rely upon their being fair and *bonâ fide* comments on a matter of public interest.

The above section was passed because it was considered that the common law pressed too severely upon newspaper editors and proprietors, who in the ordinary course of their business had presented to the public a full, true, and impartial account of what really took [*267] place at a public meeting, considering no doubt that thereby they were merely doing their duty, and then found that the law deemed them guilty of libel. For a detailed examination of its provisions, see *post*, c. XIII. p. 374. So far as I am aware, there is as yet only one reported decision on the section. It will be observed that the protection afforded by it is limited to cases in which the publication of the matter complained of was for the public benefit. Most properly so: for unless there be some advantage to the public countervailing the injury to the individual libelled, there can be no reason why damages should not be recovered. The consequences of reproducing in the papers calumnies uttered at a public meeting are most serious. The original slander may not be actionable *per se*, or the communication may be privileged; so that no action lies against the speaker. Moreover, the meeting may have been thinly attended, or the audience may have known that the speaker was not worthy of credit. But it would be a terrible thing for the person defamed if such words could be printed and published to all the world, merely because they were uttered under such circumstances at such a meeting. Charges recklessly made in the excitement of the moment will thus be diffused throughout the country, and will remain recorded in a permanent form against a perfectly innocent person. We cannot tell into whose hands a copy of that newspaper may come. Moreover, additional importance and weight is given to such a calumny by its republication in the columns of a respectable paper. Many people will believe it merely because it is in print. There is in fact an immense difference between the injury done by such a slander and that caused by its extended circulation by the press. See the remarks of Lord Campbell in *Davison* v. *Duncan*, 7 E. & B. 231; 26 L. J. Q. B. 106; 3 Jur. N. S. 613; 5 W. R. 253; 28 L. T. (Old S.) 265; and of Best, C. J., in *De Crespigny* v. *Wellesley*, 5 Bing. 402–406, cited *ante*, p. 158.

Illustrations.

The defendants, the printers and publishers of the *Manchester Courier*, published in their paper a report of the proceedings at a meeting of the Board of Guardians for the Altrincham Poor Law Union, at which *ex parte* charges were made against the medical officer of the union workhouse at Knutsford, of neglecting to attend the pauper patients when sent for. *Held*, that the matter

was one of public interest; but that the report was not privileged by the occasion, although it was admitted to be a *bonâ fide* and a correct account of what passed at the meeting; and the plaintiff recovered 40*s.* damages and costs.

Purcell v. *Sowler* (C. A.), 2 C. P. D. 215; 46 L. J. P. 308; 25 W. R. 362; 36 L. T. 416.

[*268] A public meeting was called for the purpose of petitioning Parliament against the grant to the Roman Catholic College at Maynooth. The defendant made a telling speech at such a meeting, commenting severely on penances and other portions of the discipline of the Roman Catholic Church. The Court held that the words were not privileged, although the object of the meeting was legal, and the defendant's speech was pertinent to the occasion.

Hearne v. *Stowell*, 12 A. & E. 719; 4 P. & D. 696; 6 Jur, 458; *ante*, p. 128.

See *Pierce* v. *Ellis*, 6 Ir. C. L. R. 55.

At a meeting of the West Hartlepool Improvement Commissioners, one of the Commissioners made some defamatory remarks as to the conduct of the former secretary of the Bishop of Durham in procuring from the Bishop a licence for the chaplain of the West Hartlepool Cemetery. These remarks were reported in the local newspaper, and the secretary brought an action against the owner of the newspaper for libel. A plea of justification, alleging that such remarks were in fact made at a public meeting of the commissioners, and that the alleged libel was an impartial and accurate report of what took place at such meeting, was held bad on demurrer.

Davison v. *Duncan*, 7 E. & B. 229; 26 L. J. Q. B. 104; 3 Jur. N. S. 613; 5 W. R. 253; 28 L. T. (Old S.) 265.

So, also, a newspaper proprietor will be held liable for publishing a report made to the vestry by their medical officer of health, even although the vestry are required by Act of Parliament sooner or later to publish such report themselves.

Popham v. *Pickburn*, 7 H. & N. 891; 31 L. J. Ex. 133; 8 Jur. N. S. 179; 10 W. R. 324; 5 L. T. 846

See also *Charlton* v. *Watton*, 6 C. & P. 385.

[*269]

CHAPTER IX.

MALICE.

"In an ordinary action for a libel or for words, though evidence of malice may be given to increase the damages, it never is considered as essential, nor is there any instance of a verdict for the defendant on the ground of a want of malice." (Per Bayley, J., in *Bromage* v. *Prosser*, 4 B. & C. at p. 257 ; 6 Dowl. & R. 295 ; and per Mansfield, C. J., in *Hargrave* v. *Le Breton*, 4 Burr. 2425.) As we have seen, an accidental or inadvertent publication of defamatory words is ground for an action ; *ante*, pp. 5, 6, 155. Even a lunatic is, it is said, liable for a libel. (Per Kelly, C. B., in *Mordaunt* v. *Mordaunt*, 39 L. J. Prob. & Matr. 59.) The Courts for this purpose look at the tendency of the publication, not at the intention of the publisher. (*Haire* v. *Wilson*, 9 B. & C. 643 ; 4 Man. & Ry. 605 ; *Fisher* v. *Clement*, 10 B. & C. 472 ; 5 Man. & Ry. 730.) The fact that the jury have expressly found in defendant's favour that he had no malicious intent, shall not avail him (per Maule, J., in *Wenman* v. *Ash*, 13 C. B. 845 ; 22 L. J. C. P. 190 ; 17 Jur. 579 ; 1 C. L. R. 592 ; *Huntley* v. *Ward*, 6 C. B. N. S. 514 ; 6 Jur. N. S. 18 ; 1 F. & F. 552 ; *Blackburn* v. *Blackburn*, 4 Bing. 395 ; 1 M. & P. 33, 63 ; 3 C. & P. 146) ; for if he has in fact spoken words which have injured the plaintiff's reputation he must be taken to have intended the consequences naturally resulting therefrom.

In former days this rule was not so strictly enforced in actions of slander as of libel ; the Courts in those days evincing a strong desire [*270] to discourage all actions of slander, except, perhaps, in cases where the words imputed a capital offence. Thus, where the defendant was sued for saying that he had heard that the plaintiff had been hanged for stealing a horse, and on the evidence it appeared that defendant spoke the words in genuine grief and sorrow at the news, Hobart, J., nonsuited the plaintiff, on the express ground that the words were not spoken maliciously. (*Crawford* v. *Middleton*, 1 Lev. 82. And see *Greenwood* v. *Prick*, cited Cro. Jac. 91 ; *ante*, p. 5.) Now, however, the absence of malice could only be given in evidence in mitigation of damages ; and the question whether the defendant acted maliciously or not, should never be left to the jury, unless the occasion be privileged. (*Haire* v. *Wilson*, 9 B. & C. 643 ; 4 Man. & Ry. 605. Per Lord Denman in *Baylis* v. *Lawrence*, 11 A. & E. 924 ; 3 P. & D. 529 ; 4 Jur. 652. Per Parke, B., in *O'Brien* v. *Clement*, 15 M. & W. 437.) The defendant's intention or motive in using the words is immaterial, if he has in fact wrongfully injured the plaintiff's reputation. (*Hooper* v. *Truscott*, 2 Scott, 672 ; 2 Bing. N. C. 457 ; *Godson* v. *Home*, 1 Br. & B. 7 ; 3 Moore, 223.)

It is true that the word "malicious" is usually inserted in every definition of libel or slander, that the pleader invariably introduces it into every statement of claim, and that the older cases contain many *dicta* to the effect that "malice is the gist" of an action of libel or slander. But in all these cases the word "malice" is used in a special and technical sense; it denotes merely *the absence of lawful excuse;* in fact, to say that defamatory words are malicious in that sense means simply that they are unprivileged, not employed under circumstances which excuse them. But I have thought it best to drop this technical and fictitious use of the word altogether—a use which has been termed "unfortunate" by more than one learned judge. (Per Lord Bramwell, 11 App. Cas. 253; 55 L. J. Q. B. 460; 55 L. T. 65; per Stephen, J., 41 L. T. 590.) In this book the word "malice" is always used in the popular and ordinary sense of the word; *i.e.*, to denote some ill-feeling towards the plaintiff or the public; some mean or crooked motive of which an honourable man would be ashamed. This is called "*express* malice" or "*actual* malice" in our older books. Using the word in this sense, I say that till the defendant pleads privilege, malice is no part of the issue. As soon as the judge rules that the occasion is privileged, the plaintiff has to prove malice, but not before.

In the words of Lord Justice Brett: "When there has been a writing or a speaking of defamatory matter, and the judge has held— and it is for him to decide the question—that although the matter is [* 271] defamatory the occasion on which it is either written or spoken is privileged, it is necessary to consider how, although the occasion is privileged, yet the defendant is not permitted to take advantage of the privilege. If the occasion is privileged it is so for some reason, and the defendant is only entitled to the protection of the privilege if he uses the occasion for that reason. He is not entitled to the protection if he uses the occasion for some indirect and wrong motive. If he uses the occasion to gratify his anger or his malice, he uses the occasion not for the reason which makes the occasion privileged, but for an indirect and wrong motive. If the direct and wrong motive suggested to take the defamatory matter out of the privilege is malice, then there are certain tests of malice. Malice does not mean malice in law, a term in pleading, but actual malice, that which is popularly called malice. If a man is proved to have stated that which he knew to be false, no one need inquire further. Everybody assumes thenceforth that he was malicious, that he did do a wrong thing for some wrong motive. So if it be proved that out of anger, or for some other wrong motive, the defendant has stated as true that which he does not know to be true, and he has stated it whether it is true or not, recklessly, by reason of his anger or other motive, the jury may infer that he used the occasion, not for the reason which justifies it, but for the gratification of his anger or other indirect motive. The judgment of Bayley, J., in *Bromage* v. *Prosser*, 4 B. & C., at p. 255, treats of malice in law; and no doubt where the word 'maliciously' is used is used in a pleading, it means intentionally, wilfully. It has been decided that if the word 'maliciously' is omitted in a declar-

ation for libel, and the words 'wrongfully' or 'falsely' substituted, it is sufficient, the reason being that the word 'maliciously,' as used in a pleading, has only a technical meaning; but here we are dealing with malice in fact, and malice then means a wrong feeling in a man's mind." (*Clark* v. *Molyneux*, 3 Q. B. D. 246, 247; 47 L. J. Q. B. 230; 26 W. R. 104; 37 L. T. 696, 697.)

Malice may be defined as any indirect and dishonest motive which induces the defendant to defame the plaintiff. "Malice means any corrupt motive, any wrong motive, or any departure from duty." (Per Erle, C. J., 2 F. & F. 524.) If malice be proved, the privilege attaching to the occasion, unless it be absolute, is lost at once.

The *onus* of proving malice lies on the plaintiff; the [* 272] defendant cannot be called on to prove he did not act maliciously, till some evidence of malice, more than a mere *scintilla*, has been adduced by the plaintiff. (*Taylor* v. *Hawkins*, 16 Q. B. 321; 15 Jur. 746; 20 L. J. Q. B. 313; *Cooke and another* v. *Wildes*, 5 E. & B. 340; 24 L. J. Q. B. 367; 1 Jur. N. S. 610; 3 C. L. R. 1090; *Laughton* v. *Bishop of Sodor & Man*, L. R. 4 P. C. 495; 42 L. J. P. C. 11; 21 W. R. 204; 28 L. T. 377; 9 Moore, P. C. C. N. S. 318; *Clark* v. *Molyneux*, (C. A.), 3 Q. B. D. 237; 47 L. J. Q. B. 230; 26 W. R. 104; 37 L. T. 694; 14 Cox, C. C. 10.) Such evidence may either be *extrinsic*—as of previous ill-feeling or personal hostility between plaintiff and defendant, threats, rivalry, squabbles, other actions, former libels or slanders, &c.; or *intrinsic*—the violence of defendant's language, the mode and extent of its publication, &c. But in either case, if the evidence adduced is equally consistent with either the existence or non-existence of malice, the judge should stop the case; for there is nothing to rebut the presumption which has arisen in favour of the defendant from the privileged occasion. (*Somerville* v. *Hawkins*, 10 C. B. 590; 20 L. J. C. P. 131; 15 Jur. 450; *Harris* v. *Thompson*, 13 C. B. 333; *Taylor* v. *Hawkins* 16 Q. B. 308; 20 L. J. Q. B. 313; 15 Jur. 746.) That the words are strong is no evidence of malice, if on defendant's view of the facts strong words were justified. (*Spill* v. *Maule*, L. R. 4 Ex. 232; 38 L. J. Ex. 138; 17 W. R. 805; 20 L. T. 675.) That the statement was volunteered is no evidence of malice, if it was defendant's duty to volunteer it. (*Gardner* v. *Slade et ux*, 13 Q. B. 798; 18 L. J. Q. B. 336.) That the statement is now admitted or proved to be untrue is no evidence that it was made maliciously (*Caulfield* v. *Whitworth*, 16 W. R. 936; 18 L. T. 527); though proof that defendant *knew* it was untrue when he made it would be conclusive evidence of malice. If the defendant is in a position to prove the truth of his statement, "he has no need of privilege: the only use of privilege is in cases where the truth of the statement cannot be proved." (Per Lord Coleridge, C. J., [* 273] in *Howe* v. *Jones*, 1 Times L. R. at p. 462. This is so also in America; see *Lewis and Herrick* v. *Chapman* (Selden, J.), 2 Smith (16 N. Y. R.) 369; *Vanderzee* v. *McGregor*, 12 Wend. 546; *Fowles* v. *Bowen*, 3 Tiffany (30 N. Y. R.) 20.)

A mere mistake innocently made through excusable inadvertence cannot in any case be evidence of malice. (*Harrison* v. *Bush*, 5 E. & B. 350; 1 Jur. N. S. 846; 25 L. J. Q. B. 25; *Brett* v. *Watson*, 20 W. R. 723; *Kershaw* v. *Bailey*, 1 Ex. 743; 17 L. J. Ex. 129; *Scarll* v. *Dixon*, 4 F. & F. 250; *Pater* v. *Baker*, 3 C. B. 831; 16 L. J. C. P. 124; 11 Jur. 370; *Tompson* v. *Dashwood*, 11 Q. B. D. 43; 52 L. J. Q. B. 425; 48 L. T. 943; 48 J. P. 55.)

The question of malice or no malice is for the jury. But there is always the prior question: "Is there any evidence of malice to go to the jury?" and this is for the judge. The presumption in favour of the defendant arising from the privileged occasion remains till it is rebutted by evidence of malice; and evidence merely equivocal, that is, equally consistent with malice or *bonâ fides*, will do nothing towards rebutting the presumption; if therefore, only such evidence be offered, the judge should nonsuit the plaintiff. So, too, the judge should stop the case if there be no more than a *scintilla* of evidence of malice to go the jury. But it is difficult to say beforehand what will be deemed a mere *scintilla*, what more than a *scintilla*, in any given case. The same evidence may make different impressions on different minds (See *Adams* v. *Coleridge*, 1 Times L. R. 87).

The facts tendered as evidence of malice must always go to prove that the defendant himself was actuated by personal malice against the plaintiff. In an action against the *publisher* of a magazine, evidence that the *editor* or the author of any article, not being the publisher, had a spite against the plaintiff, is of course inadmissible. (*Robertson* v. *Wylde*, 2 Moo. & Rob. 101; *Clark* v. *Newsam*, 1 Ex. 131, 139; *Carmichael* v. *Waterford and Limerick Ry. Co.*, 13 Ir. L. R. 313. So in America, *York* v. *Pease*, 2 Gray (68 Mass.) 282.)

Illustrations.

Defendant claimed a leasehold interest in the manor and castle of Hely, and produced a lease which she knew to be a forgery. Judgment for the plaintiff.

Gerard v. *Dickenson* (1590), 4 Rep. 18; Cro. Eliz. 197.

Defendant wrote to his wife's uncle telling him that his son and heir was leading a fast wild life, and was longing for his father's death, and that all his [274*] inheritance would not be sufficient to satisfy his debts. The Court of Star Chamber were satisfied that this letter was written with the intention of alienating the father from the son, and inducing the father to leave his lands and money to the defendant or his wife, and not from an honest desire that the son should reform his life; and they fined defendant £200.

Peacock v. *Reynal* (1612), 2 Brownlow and Goldesborough, 151.

Plaintiff assaulted the defendant on the highway; the defendant met a constable and asked him to arrest the plaintiff. The constable refused to arrest the plaintiff unless he was charged with a felony. The defendant knowing full well that the plaintiff had committed a misdemeanour only, viz., the assault, charged him with felony, in order to get him locked up for the night. *Held*, that the charge of felony was malicious, as being made from an indirect and improper motive.

Smith v. *Hodgeskins* (1633), Cro. Car. 276.

A near relative may warn a lady not to marry a particular suitor, and assign his reasons for thus cautioning her, provided this be done from a conscientious desire for her welfare, and in the *bonâ fide* belief that the charges made are true.

Todd v. *Hawkins*, 2 M. & Rob. 20; 8 C. & P. 888.

Per De Grey, C. J., in case cited 2 Smith, at p. 4.

As to a mere friend.

See *Byam* v. *Collins*, 39 Hun. (46 N. Y. Sup. Ct.) 204 ; and per Hill, J., in case referred to in 15 C. B. N. S. 410, 411 ; 33 L. J. C. P. 93 ; *ante*, p. 219.

But if a rival thus endeavoured to oust the plaintiff from the lady's affections, there would be evidence of malice to go to the jury.

And see *Adams* v. *Coleridge*, 1 Times L. R. 84.

It is usual for a former master to give the character of a servant *on application*, and not before. Hence if a master hears a discharged servant is applying for a place at M.'s house, and writes at once to M. to give the servant a bad character, the fact that the communication was uncalled for will be apt to tell against the master. M. would almost certainly have applied to the defendant for the information sooner or later ; and the eagerness displayed in thus imparting it unasked will be commented on as a proof of malice, and if there be any other evidence of malice, however slight, may materially influence the verdict. But if there be no other evidence of malice, the communication is still privileged.

Pattison v. *Jones*, 8 B. & C. 578; 3 M. & R. 101.

Fowles v. *Bowen*, 3 Tiffany (30 N. Y. R.) 20 ; *ante*, p. 203.

The defendant on being applied to for the character of the plaintiff, who had been his saleswoman, charged her with theft. He had never made such a charge against her till then ; he told her that he would say nothing about it, if she resumed her employment at his house ; subsequently he said that if she would acknowledge the theft he would give her a character. *Held*, that there was abundant evidence that the charge of theft was made *malâ fide*, with the intention of compelling plaintiff to return to defendant's service. Damages, £60.

Jackson v. *Happerton*, 16 C. B. N. S. 829 ; 12 W. R. 913 ; 10 L. T. 529.

Rogers v. *Clifton*, 3 B. & P. 587.

[* 275] The defendant made a charge of felony against his former shopman to his relatives during his absence in London, with a view of inducing them to compound the alleged felony, and not for the purpose of prosecution or investigation. He actually received £50 from plaintiff's brother as hush-money. *Held*, that the charge of felony was altogether unprivileged.

Hooper v. *Truscott*, 2 Bing. N. C. 457 ; 2 Scott, 672.

A colonel was dismissed from his command in consequence of charges made by the defendant. A member of Parliament gave notice that he would ask a question in the House of Commons relative to this dismissal. Defendant thereupon called on the member, whom he knew, to explain matters. The conversation that ensued was held to be *primâ facie* privileged ; but on proof that the charges were made, not from a sense of duty, but from personal resentment on account of other matters, and that the object of the conversation was to prejudice the plaintiff by reason of such personal resentment—*held*, that there was actual malice, taking away the privilege.

Dickson v. *The Earl of Wilton*, 1 F. & F. 419.

A speech made by a member of Parliament in the House is absolutely privileged ; but if he subsequently causes his speech to be printed and published, with the malicious intention of injuring the plaintiff, he will be liable both civilly and criminally.

R. v. *Lord Abingdon*, 1 Esp. 226.

R. v. *Creevey*, 1 M. & S. 273.

The rector dismissed the parish schoolmaster for refusing to teach in the Sunday School. The schoolmaster opened another school on his own account in the parish. The rector published a pastoral letter warning all parishioners not to support "a schismatical school," and not to be partakers with the plaintiff "in his evil deeds," which tended "to produce disunion and schism," and "a spirit of opposition to authority." *Held*, that there was some evidence to go to the jury that the rector cherished anger and malice against the schoolmaster.

Gilpin v. *Fowler*, 9 Ex. 615 ; 23 L. J. Ex. 152 ; 18 Jur. 293.

I. *Extrinsic evidence of malice.*

Malice may be proved by extrinsic evidence showing that the defendant bore a long-standing grudge against the plaintiff, that there were former disputes between them, that defendant had formerly been in the plaintiff's employ and was dismissed for misconduct, or any previous quarrels, rivalry, or ill-feeling between plaintiff and defendant. Anything defendant has ever said or done with reference to the plaintiff may be urged as evidence of malice. Indeed, it is very difficult to say what possible evidence is inad- [* 276] missible on this issue. The plaintiff has to show what was in the defendant's mind at the time of publication, and of that no doubt the defendant's acts and words on that occasion are the best evidence. But if plaintiff can prove that at any other time, before or after, defendant had any ill-feeling against him, that is some evidence that the ill-feeling existed also at the date of publication; therefore, all defendant's acts and deeds that point to the existence of any such ill-feeling at any date, are evidence admissible for what they are worth. (*Cooper* v. *Blackmore and others*, 2 Times L. R. 746.) In fact, whenever the state of a person's mind on a particular occasion is in issue, everything that can throw any light on the state of his mind then is admissible, although it happened on some other occasion. (See *R.* v. *Francis*, L. R. 2 C. C. R. 128; and *Blake* v. *Albion Assurance Society*, 4 C. P. D. 94; 48 L. J. C. P. 169; 27 W. R. 321; 40 T. 211.)

Thus any other words written or spoken by the defendant of the plaintiff, either before or after those sued on, or even after the commencement of the action, are admissible to show the *animus* of the defendant; and for this purpose it makes no difference whether the words tendered in evidence be themselves actionable or not, or whether they be addressed to the same party as the words sued on or to some one else. (*Pearson* v. *Lemaitre*, 5 M. & Gr. 700; 12 L. J. Q. B. 253; 7 Jur. 748; 6 Scott, N. R. 607; *Mead* v. *Daubigny*, Peake, 168.) Such other words need not be connected with or refer to the libel or slander sued on; provided they in any way tend to show malice in defendant's mind at the time of publication. (*Barrett* v. *Long*, 3 H. L. C. 395; 7 Ir. L. R. 439; 8 Ir. L. R. 331; *Bolton* v. *O'Brien*, 16 L. R. Ir. 97, 483.) And not only are such other words admissible in evidence, but also all circumstances attending their publication, the mode and extent of their repetition, &c.; the more the evidence approaches proof of a systematic practice of libelling or slandering the plaintiff, the more convincing it will be. (*Bond* v. *Douglas*, 7 C. & P. 626; [*277] *Barret* v. *Long*, 3 H. L. C. p. 414.) The jury no doubt should be told, whenever the other words so tendered in evidence are in themselves actionable, that they must not give damages in respect of such other words, because they might be the subject-matter of a separate action (*Pearson* v. *Lemaitre*, *supra*;) but the omission by the judge to give such a caution will not amount to a misdirection. *Darby* v. *Ouseley*, 1 H. & N. 1; 25 L. J. Ex. 227; 2 Jur. N. S. 497.) But the defendant is always at liberty to prove the truth of such other words so

given in evidence; for he could not *plead* a justification as to them, as they were no set out on the record. (*Stuart* v. *Lovell*, 2 Stark 93; *Warne* v. *Chadwell*, 2 Stark. 457.)

It must be remembered that this evidence of former or subsequent defamation is only admissible to determine *quo animo* the words sued on were published; that is, they are only admissible when *malice in fact* is in issue. If there is no question of malice, no such other libels would be admissible, unless they had immediate reference to the libel sued on, or helped to explain or modify it. (*Ante*, p. 98; *Finnerty* v. *Tipper*, 2 Camp. 72; *Stuart* v. *Lovell*, 2 Stark 93; *Defries* v. *Davis*, 7 C. & P. 112.) For such other libels are clearly independent substantive causes of action, and should not be used unfairly to enhance the damages in this action. It has sometimes been held that even when malice is in issue other words could not be given in evidence if they themselves were actionable. (*Pearce* v. *Ornsby*, 1 M. & Rob. 455; *Symmons* v. *Blake*, *ib.* 477; but these cases are expressly overruled, or explained away, by Tindal, C. J., in 5 M. & Gr. 719, 720. And see the remarks of Lord Ellenborough in *Rustell* v. *Macquister*, 1 Camp. 49, n.; and of Jervis, C. J., in *Camfield* v. *Bird*, 3 C. & Kir. 56.) And it is now clear law that whenever the intention of the defendant is *equivocal*, that is, whenever the question of malice or *bonâ fides* is properly about to be left to the jury, evidence of any previous or subsequent libel is admissible, even though it be more than six years prior to the libel sued on; and even though a former action has been brought for the libel now tendered in evidence and damages recovered therefor. (*Symmons* v. *Blake*, 1 M. & Rob. 477; *Jackson* v. *Adams*, 2 Scott, 599. See also *Charlter* v. *Barrett*, Peake, 32; *Lee* v. *Huson*, Peake, 223. The law is the same in America: *Fowles* v. *Bowen*, 3 Tiffany (30 N. Y. R.) 20.)

[*278] So if the defendant reasserts the libel in numbers of his periodical appearing after commencement of the action (*Chubb* v. *Westley*, 6 C. & P. 436); or in private letters written after action (*Pearson* v. *Lemaitre*, 5 M. & Gr. 700); (unless such letters be themselves privileged, as in *Whiteley* v. *Adams*, 15 C. B. N. S. 392; 33 L. J. C. P. 89; 10 Jur. N. S. 470; 12 W. R. 153; 9 L. T. 483); or if the defendant continues to sell copies of the libel at his shop up to two days before the trial (*Plunket* v. *Cobbet*, 5 Esp. 136; *Barwell* v. *Adkins*, 2 Scott, N. R. 11; 1 M. & Gr. 807); these facts are admissible as evidence of deliberate malice, though no damages can be given in respect of them. A plea of justification may be such a reassertion of the libel or slander. No doubt where the words are privileged, the mere fact that a plea of justification was put on the record is not of itself evidence of malice sufficient to go to the jury. (*Wilson* v. *Robinson*, 7 Q. B. 68; *Caulfield* v. *Whitworth*, 16 W. R. 936; 18 L. T. 527; *Brooke* v. *Avrillon*, 42 L. J. C. P. 126.) But if there be other circumstances suggesting malice, the plaintiff's counsel may also comment on the justification pleaded; and, indeed, in special circumstances, as where the defendant at the trial will neither abandon the plea, nor give any evidence in support of it, thus ob-

stinately persisting in the charge to the very last without any sufficient reason, this alone may be sufficient evidence of malice. (*Warwick* v. *Foulkes*, 12 M. & W. 508 ; *Simpson* v. *Robinson*, 12 Q. B. 511 ; 18 L. J. Q. B. 73.)

The mere fact that the words are now proved or admitted to be false is no evidence of malice, unless evidence be also given by the plaintiff to show that the defendant knew they were false at the time of publication. (*Fountain* v. *Boodle*, 3 Q. B. 5 ; *Caulfield* v. *Whitworth*, 16 W. R. 936 ; 18 L. T. 527 ; *Clark* v. *Molyneux* (C. A.), 3 Q. B. D. 237 ; 47 L. J. Q. B. 230 ; 26 W. R. 104 ; 37 L. T. 694 ; 14 Cox, C. C. 10.) Day, J., must be mis-reported in *Palmer* v. *Hummerston*, 1 Cababé & Ellis, 36. The *dictum* of Lord Denman, C. J., in *Blagg* v. *Sturt*, 10 Q. B. 905 ; 16 L. J. Q. B. 42, is [*279] expressly overruled or explained away by Williams, J., in *Harris* v. *Thompson*, 13 C. B. at p. 352.

Illustrations.

Where a master has given a servant a bad character, the circumstances under which they parted, any expressions of ill-will uttered by the master then or subsequently, the fact that the master never complained of the plaintiff's misconduct whilst she was in his service, or when dismissing her would not specify the reason for her dismissal, and give her an opportunity of defending herself, together with the circumstances under which the character was given, and its exaggerated language, are each and all evidence of malice.

Kelly v. *Partington*, 4 B. & Adol. 700 ; 2 N. & M. 460.

Jackson v. *Hopperton*, 16 C. B. N. S. 829 ; 12 W. R. 913 ; 10 L. T. 529 ; *ante*, p. 203.

And in such a case plaintiff is permitted to give general evidence of his or her good character, in order to show that the defendant must have known she did not deserve the bad character he was writing.

Fountain v. *Boodle*, 3 Q. B. 5 ; 2 G. & D. 455.

Rogers v. *Sir Gervas Clifton*, 3 B & P. 587 ; *ante*, p. 203.

There had been a dispute between plaintiff and defendant prior to the slander about a sum of £20 which the plaintiff claimed from the defendant. At the trial, also, the plaintiff offered to accept an apology and a verdict for nominal damages if defendant would withdraw his plea of justification. The defendant refused to withdraw the plea, yet did not attempt to prove it. *Held*, ample evidence of malice. Damages £40.

Simpson v. *Robinson*, 12 Q. B. 511 ; 18 L. J. Q. B. 73 ; 13 Jur. 187.

Plaintiff brought an action against defendant, and applied for an injunction. Defendant applied at the same time for a receiver, which was refused. Thereupon the defendant said that he would "make it d——d hot for Dodson," and inserted in a newspaper he owned a report of the application, setting out all his own counsel had said against plaintiff's solvency, &c., at full length, but omitting all mention of plaintiff's affidavit. *Held*, ample evidence of malice. Damages £250.

Dodson v. *Owen*, 2 Times L. R. 111.

Even though a report of judicial proceedings be correct and accurate, still if it be published from a malicious motive, whether by a newspaper reporter or any one else, the privilege is lost.

Stevens v. *Sampson*, 5 Ex. D. 53 ; 49 L. J. Q. B. 120 ; 28 W. R. 87 ; 41 L. T. 782.

Plaintiff was town-clerk and clerk to the borough justices. Defendant said that he should feel great pleasure in ridding the borough of men like the plaintiff. So he sent a petition, charging plaintiff with corruption in his office and praying for an inquiry, to an official who had no jurisdiction over the matter. Verdict for the plaintiff. Damages £100.

Blagg v. *Sturt*, 10 Q. B. 899 ; 16 L. J. Q. B. 39 ; 11 Jur. 101 ; 8 L. T. (Old S.) 135.

It is *some* evidence of malice that plaintiff and defendant are rivals in trade, [*280] or that they competed together for some post, and plaintiff succeeded, and that then defendant, being disappointed, wrote the libel.

Warman v. *Hine*, 1 Jur. 820.

Smith v. *Mathews*, 1 Moo. & Rob. 151.

The defendant wrote a letter to be published in the newspaper. The careful editor struck out all the more outrageous passages, and published the remainder. The defendant's manuscript was admitted in evidence, and the obliterated passages read to the jury, to show the *animus* of the defendant.

Turpley v. *Blaby*, 2 Scott, 642; 2 Bing. N. C. 437; 1 Hodges, 414; 7 C. & P. 395.

A long practice by the defendant of libelling the plaintiff is cogent evidence of malice; therefore other libels of various dates, some more than six years old, some published shortly before that sued on, are all admissible to show that the publication of the culminating libel sued on was malicious and not inadvertent.

Barrett v. *Long*, 3 H. L. C. 395; 7 Ir. L. R. 439; 8 Ir. L. R. 331.

A libel having appeared in a newspaper, subsequent articles in later numbers of the same newspaper, alluding to the action and affirming the truth of the prior libel, are admissible as evidence of malice.

Chubb v. *Westley*, 6 C. & P. 436.

Barwell v. *Adkins*, 1 M. & Gr. 807; 2 Sc. N. R. 11.

Mead v. *Daubigny*, Peake, 168.

So, if there be subsequent insertions of substantially the same libel in other newspapers.

Delegal v. *Highley*, 8 C. & P. 444: 5 Scott, 154; 3 Bing. N. C. 950; 3 Hodges, 158.

So, if the defendant persists in repeating the slander or disseminating the libel pending action. In *Pearson* v. *Lemaitre*, 5 M. & Gr. 700; 6 Scott, N. R. 607; 12 L. J. Q. B. 253; 7 Jur. 748, a letter was admitted which had been written subsequently to the commencement of the action, and fourteen months after the libel complained of. In *Macleod* v. *Wakley*, 3 C. & P. 311, Lord Tenderten admitted a paragraph published only two days before the trial.

Defendant was director of a company of which plaintiff was auditor. Defendant made a charge against plaintiff in his absence at a meeting of the Board. At the next meeting of the Board plaintiff attended with his solicitor, having in the meantime written to defendant threatening an action. Defendant in consequence refused to make any charge or produce any evidence against the plaintiff in the presence of his solicitor. *Held*, no evidence of malice.

Harris v. *Thompson*, 13 C. B. 333.

Where the defendant verbally accused plaintiff of perjury, evidence that subsequently to the slander defendant preferred an indictment against the plaintiff for perjury, which was ignored by the grand jury, was received as evidence that the slander was deliberate and malicious, although it was a fit subject for an action for malicious prosecution.

Tute v. *Humphrey*, 2 Camp. 73, n.

And see *Finden* v. *Westlake*, Moo. & Malkin, 461.

In an action for libel and slander on privileged occasions, the only evidence of malice was some vague abuse of the plaintiff, uttered by the defendant on the Saturday before the trial in a public-house at Rye. Such abuse had no reference to the slander or the libel or to the action. *Held*, that this evidence was [*281] admissible; but that the judge should have called the attention of the jury to the vagueness of the defendant's remarks in the public-house, to the fact that they were uttered many months after the alleged slander and libel, and that therefore they were but very faint evidence that the defendant bore the plaintiff malice at the time of the publication of the alleged slander and libel. A new trial was ordered. Costs to abide the event.

Hemmings v. *Gasson*, E. B. & E. 346; 27 L. S. Q. B. 252; 4 Jur. N. S. 834.

Defendant charged the plaintiff, his porter, with stealing his bed-sticks, and with plaintiff's permission subsequently searched his house, but found no stolen property. The jury found that the defendant *bonâ fide* believed that a robbery had been committed by the plaintiff, and made the charge with a view to inves-

tigation; but added, "the defendant ought not to have said what he could not prove." *Held*, that this finding was immaterial, that the occasion was privileged, and that there was no evidence of malice. Judgment for the defendant.

Howe v. *Jones*, 1 Times L. R. 19, 461.

Fowler and wife v. *Homer*, 3 Camp. 294.

II. *Evidence of malice derived from the mode and extent of publication, the terms employed, &c.*

The plaintiff is not restricted to extrinsic evidence of malice (*Wright* v. *Woodgate*, 2 C. M. & R. 573; 1 Tyr. & G. 12; 1 Gale, 329); he may rely on the words of the libel itself and the circumstances attending its publication; or in the case of slander upon the exaggerated language used, on the fact that third persons were present who were not concerned in the matter, &c. &c.

The fact that the defendant was mistaken in the information he gave is, as we have seen, no evidence of malice: *ante*, p. 272. The jury must look at the circumstances as they presented themselves to the mind of the defendant at the time of the publication; not at what are proved at the trial to have been the true facts of the case. It is a question of *bonâ fides:* Did the defendant honestly believe that he had a duty to perform in the matter, and act under a sense of that duty? That other men would not have so acted is immaterial. That shrewder men would have seen through the tangled web of facts, and have discovered that things were not as they seemed, is [* 282] absolutely immaterial. The question is, Did the actual defendant honestly believe what he said? not whether a reasonable man so placed would have believed it. (Per Brett, L. J., 3 Q. B. D. 248.) The defendant will not lose the privilege afforded by the occasion merely because his reasoning powers were defective. (Per Cotton, L. J., *ib.* 249.) "People believe unreasonable things *bonâ fide*," says O'Hagan, J., in *Fitzgerald* v. *Campbell*, 15 L. T. 75.

Similarly, the fact that he relied upon hearsay evidence without seeking primary evidence is no evidence of malice. (Per Lord Westbury in *Lister* v. *Perryman*, L. R. 4 H. L. 521; overruling (Exch. Ch.) L. R. 3 Exch. 197.) Men of business habitually act upon hearsay evidence in matters of the greatest importance. But this is supposing of course that the defendant is guilty of no laches, and does not wilfully shut his eyes to any source of information. If, indeed, there were means at hand for ascertaining the truth of the matter, of which the defendant neglects to avail himself, and chooses rather to remain in ignorance when he might have obtained full information, this will be evidence of such wilful blindness as may amount to malice.

But if defendant at the time of publication knew that what he said was false, this is clear evidence of malice. A man who knowingly makes a false charge against his neighbour cannot claim privilege. It can never be his duty to circulate lies. And if the statement was made wantonly, without the defendant's knowing or caring whether it was true or false, such recklessness is considered

as malicious as deliberate falsehood. (*Clark* v. *Molyneux*, 3 Q. B. D. 247 ; 47 L. J. Q. B. 230 ; 26 W. R. 104 ; 37 L. T. 694.)

So if in writing or speaking on a privileged occasion the defendant breaks out into irrelevant charges against the plaintiff wholly unconnected with the occasion whence the privilege is derived, such excess will be evidence of malice ; or speaking more accurately, such irrelevant charges are wholly unprivileged, and no question of actual malice arises [* 283] as to them ; unless defendant proves them true the verdict must go against him. (*Huntley* v. *Ward*, 6 C. B. N. S. 514 ; 6 Jur. N. S. 18 ; *Senior* v. *Medland*, 4 Jur. N. S. 1039 ; *Picton* v. *Jackman*, 4 C. & P. 257 ; *Simmonds* v. *Dunne*, Ir. R. 5 C. L. 358.) One part of a letter may be privileged ; other parts of the same unprivileged. (*Warren* v. *Warren*, 1 C. M. & R. 251; 4 Tyr. 850 ; *Jacob* v. *Lawrence*, 4 L. R. Ir. 579.)

And even though it is clear that the defendant believed in the truth of the communication he made, and was acting under a sense of duty on a privileged occasion, the plaintiff's counsel may still rely upon the words employed, and the manner and mode of publication, as evidence of malice. A man honestly indignant may often be led away into exaggerated or unwarrantable expressions ; or he may forget where and in whose presence he is speaking, or how and to whom his writing may be published. Clearly this is but faint evidence of actual malice ; the jury will generally pardon a slight excess of righteous zeal. But in some cases (which we will proceed to examine) such excess has secured plaintiff the verdict.

(i.) *Where the expressions employed are exaggerated and unwarrantable ; but there is no other evidence of malice.*

"It is sometimes difficult to determine when defamatory words in a letter may be considered as *by themselves* affording evidence of malice." (Per Bramwell, L. J., 3 Q. B. D. 245.) But the test appears to be this. Take the facts as they appeared to the defendant's mind at the time of publication ; are the terms used such as the defendant might have honestly and *bonâ fide* employed under the circumstances ? If so, the judge should stop the case. For if the defendant honestly believed the plaintiff's [*284] conduct to be such as he described it, the mere fact that he used strong words in describing it is no evidence of malice to go to the jury. (*Spill* v. *Maule*, Exch. Ch., L. R. 4 Exch. 232 ; W. R. 805 ; 20 L. T. 675 ; 38 L. J. Ex. 138.)

But where the language used, though taken in connection with what was in defendant's mind at the time, is "much too violent for the occasion and circumstances to which it is applied," or "utterly beyond and disproportionate to the facts," or where improper motives are unnecessarily imputed, there is evidence of malice to go to the jury. (*Fryer* v. *Kinnersley*, 15 C. B. N. S. 422 ; 33 L. J. C. P. 96 ; 12 W. R. 155 ; 9 L. T. 415 ; *Gilpin* v. *Fowler*, 9 Ex. 615 ; 23 L. J. Ex. 152 ; 18 Jur. 293.) For in such a case it may be inferred that the defendant bore plaintiff a grudge, or had some sinister motive in writing as he did.

Such an inference will be readily drawn in cases where a rumour prejudicial to the plaintiff has reached the defendant, which he feels it his duty to report to those concerned, if in reporting it he does not state the rumour as it reached him, but gives exaggerated or highly coloured version of it. "*Inimici famam non ita, ut nata est, ferunt.*" (Plaut. Persa II. i. 23.) But in other cases the tendency of the Courts is *not* to submit the language of privileged communications to too strict a scrutiny. "To hold all excess beyond the absolute exigency of the occasion to be evidence of malice would in effect greatly limit, if not altogether defeat, that protection which the law throws over privileged communications." (Per Sir Robert Collier, L. R. 4 P. C. 508.) "The particular expressions ought not to be too strictly scrutinized, provided the intention of the defendant was good." (Per Alderson. B., in *Woodward* v. *Lander*, 6 C. & P. 550. And see *Taylor* v. *Hawkins*, 16 Q. B. 308; *Rickley* v. *Kiernan*, 7 Ir. C. L. R. 75; *R.* v. *Perry*, 15 Cox, C. C. 169.) That the expressions are angry is not enough; the jury must go [*285] further, and see that they are malicious. (Per Tindal, C. J., in *Shipley* v. *Todhunter*, 7 C. & P. 690.)

Illustrations.

Defendant changed his printer, and on a privileged occasion stated in writing, as his reason for so doing, that to continue to pay the charges made by his former printer, the plaintiff, would be "to submit to what appears to have been an attempt to extort money by misrepresentation." *Held*, that these words, imputing improper motives to the plaintiff, were evidence of malice to go to the jury. Damages £50.

Cooke v. *Wildes*, 5 E. & B. 328; 24 L. J. Q. B. 367; 1 Jur. N. S. 610; 3 C. L. R. 1090.

O'Donoghue v. *Hussey*, Ir. R. 5 C. L. 124.

Plaintiff sued defendant on a bond; defendant in public, but on a privileged occasion, denounced the plaintiff for attempting to extort money from him. *Held*, that the words were in excess of the occasion.

Robertson v. *M'Dougall*, 4 Bing. 670; 1 M. & P. 692; 3 C. & P. 259. See *Tuson* v. *Evans*, 12 A. & E. 733; *ante*, p. 231.

While the defendant was engaged in winding up the affairs of the plaintiff's firm, of which defendant was also a creditor, the plaintiff took from the cash-box a parcel of bills to the amount of £1,264. Thereupon the defendant wrote to another creditor of the firm that the conduct of the plaintiff "has been most disgraceful and dishonest; and the result has been to diminish materially the available assets of the estate." *Held*, that the occasion was privileged, and that though the words were strong, they were, when taken in connection with the facts, such as might have been used honestly and *bonâ fide* by the defendant; for the plaintiff's conduct was equivocal, and might well be supposed by the defendant to be such as he described it; and that the judge was right in directing a verdict to be entered for the defendant, there being no other evidence of actual malice.

Spill v. *Maule* (Exch. Ch.), L. R. 4 Ex. 232; 38 L. J. Ex. 138; 17 W. R. 805; 20 L. T. 675.

The defendant tendered to Brown at Crickhowell two £1 notes on the plaintiffs' bank, which Brown returned to him, saying there was a run upon that bank, and he would rather have gold. The defendant, the very next day, went into Brecon, and told two or three people confidentially that the plaintiffs' bank had *stopped*, and that *nobody* would take their bills. *Held*, that this exaggeration was *some* evidence of malice to go to the jury. Verdict for the defendant.

Bromage v. *Prosser*, 4 B. & Cr. 247; 6 D. & R. 296; 1 C. & P. 475. And see *Senior* v. *Medland*, 4 Jur. N. S. 1039.

A gentleman told the second master of a school that he had seen one of the under-masters of the school on *one* occasion coming home at night "under the influence of drink," and desired him to acquaint the authorities with the fact. The second master subsequently stated to the governors that it was *notorious* that the under-master came home "almost *habitually* in a state of intoxication." There was no other evidence of malice. *Held*, that Cockburn, C. J., was right in not withdrawing the case from the jury.

Hume v. *Marshall*, *Times* for November 26th, 1877.

[*286] (ii.) *As to the method of communication employed.*

If the mode and extent of a privileged publication be deliberately made more injurious to the plaintiff than necessary, this is evidence of malice in the publisher. Confidential communications should not be shouted across the street for all the world to hear. (*Wilson* v. *Collins*, 5 C. & P. 373.) Defamatory remarks, if written at all, should be sent in a private letter properly sealed and fastened up; not written on a post-card, or sent by telegraph; for two strangers at least read every telegram; many more most post-cards. (*Williamson* v. *Freer*, L. R. 9 C. P. 393; 43 L. J. C. P. 161; *Whitfield* v. *S. E. Ry. Co.*, E. B. & E. 115; *Robinson* v. *Jones*, 4 L. R. Ir. 391.) Letters as to the plaintiff's private affairs should not be published in the newspaper, however meritorious the writer's purpose may be: unless, indeed, there is no other way in which the writer can efficiently effect his purpose and discharge the duty which the law has cast upon him. But where it is usual and obviously convenient to print such a communication as that complained of, before circulating it amongst the persons concerned, the privilege will not be lost merely because of the necessary publication to the compositors and journeymen printers employed in printing it. (*Lawless* v. *Anglo-Egyptian Cotton and Oil Co.*, L. R. 4 Q. B. 262.) So with an advertisement inserted in a newspaper defamatory of the plaintiff; if such advertisement be necessary to protect the defendant's interests, or if advertising was the only way of effecting the defendant's object, and such object is a legal one, then the circumstances excuse the extensive publication. But if it was not necessary to advertise at all, or if the defendant's object could have been equally well effected by an advertisement which did not contain the words defamatory of the plaintiff, then the extent given to the announcement is evidence of malice to go to the jury. (*Brown* v *Croome*, 2 Stark. 297; and *Lay* v. *Lawson*, 4 A. & E. 795; overruling, or at least explaining, *Delany* v. *Jones*, 4 Esp. 191.) The law is the same as to posting libellous placards (*Cheese* v. *Scales*, 10 M. & W. 488); or having a libellous notice cried by the town crier. (*Woodard* v. *Dowsing*, 2 Man. & Ry. 74.)

So with a privileged oral communication, it is important to observe who is present at the time it is made. A desire should be shown to avoid all unnecessary publicity. It is true that the accidental presence of an uninterested bystander will not alone take the case out of the privilege, and there are some communications which it is wise to make in the presence of witnesses; but if it can be proved that defendant purposely chose a time for making the

communication when others were by, whom he knew would act upon it, this is evidence of malice.

The distinction should be observed between publications which are unprivileged, and circumstances showing malice which render a clearly privileged publication actionable. To deliberately give any unnecessary publicity to statements defamatory of another, raises at least a suspicion of malice. But if I accidentally or inadvertently communicate the statement to a person who is unconcerned in its subject-matter, having no formed intention or desire of defaming the plaintiff to *him*, this is no evidence of malice; though it may be that the publication to him is unprivileged *ab initio*. (*Tompson* v. *Dashwood*, 11 Q. B. D. 43; 52 L. J. Q. B. 425; 48 L. T. 943; 48 J. P. 55.) Again, if in writing or speaking on a privileged occasion, the defendant breaks out into irrelevant charges against the plaintiff, wholly unconnected with the occasion whence the privilege is derived, such excess may perhaps be regarded as evidence of malice, making the relevant matter actionable; but it is more accurate to say that such irrelevant charges are wholly unprivileged, and no question of actual malice arises as to them; unless defendant proves them true, the verdict must go against him. (*Huntley* v. *Ward*, 6 C. B. N. S. 514; 6 Jur. N. S. 18; *Warren* v. *Warren*, 1 C. M. & R. 251; 4 Tyr. 850.) So the fact that the defendant volunteered the information is no evidence of malice if it was his duty to volunteer it. But if the defendant's interference was officious and uncalled for, then his communication never was privileged, and no inquiry need be made as to [* 288] the existence of malice. Again, an uneducated, or even a well-educated, man may easily make a *bonâ fide* mistake as to the respective functions of various state officials. Such a mistake therefore is no evidence of malice. If in seeking redress for some grievance I invoke the aid of someone who has no possible duty or power to remedy the abuse complained of, the communication to him may or may not be wholly unprivileged (see *ante*, p. 227); but it is certainly not malicious, unless I purposely selected that individual in order to do the plaintiff the greater injury.

Illustrations.

The defendant, the tenant of a farm, required some repairs to be done at his house; the landlord's agent sent up two workmen, one of whom was the plaintiff. They made a bad job of it; the plaintiff undoubtedly got drunk while on the premises; and the defendant was convinced from what he heard that the plaintiff had broken open his cellar-door, and drunk his cider. Two days afterwards the defendant met the plaintiff and a mason called Taylor, and charged the plaintiff with breaking open the cellar-door, getting drunk, and spoiling the job. He repeated this charge later in the same day to Taylor alone in the absence of the plaintiff, and also to the landlord's agent. *Held*, that the communication to the landlord's agent was clearly privileged, as he was the plaintiff's employer; that the statement made to the plaintiff in Taylor's presence was also privileged, if made honestly and *bonâ fide*; and that the circumstance of its being made in the presence of a third person did not *of itself* make it unauthorized; and that it was a question to be left to the jury to determine from the circumstances, including the style and character of the language used,

whether the defendant acted *bonâ fide*, or was influenced by malicious motives. But that the statement to Taylor, in the absence of the plaintiff, was unauthorized and officious, and therefore not protected, although made in the belief of its truth, if it were in point of fact false. Defendant had, in fact, repeated the charge once too often.

Toogood v. *Spyring*, 1 Cr. M. & R. 181 ; 4 Tyr. 582.

If libellous matter, which would have been privileged if sent in a sealed letter, be transmitted unnecessarily by telegraph, the privilege is thereby lost.

Williamson v. *Freer*, L. R. 9 C. P. 393 ; 43 L. J. C. P. 161 ; 22 W. R. 878 ; 30 L. T. 332.

An Irish Court will take judicial notice of the nature of a post-card, and will presume that others besides the person to whom it is addressed will read what is written thereon.

Robinson v. *Jones*, 4 L. R. Ir. 391.

The defendant was a customer at the plaintiff's shop, and had occasion to complain of what he considered fraud and dishonesty in the plaintiff's conduct of his business ; but instead of remonstrating quietly with him, the defendant stood outside the shop-door, and spoke so loud as to be heard by everyone passing down the street. The language he employed also was stronger than the [* 289] occasion warranted. *Held*, that there was evidence of malice to go to the jury. Damages 40*s*.

Oddy v. *Lord George Paulet*, 4 F. & F. 1009.

And see *Wilson* v. *Collins*, 5 C. & P. 373.

That defendant caused the libel to be industriously circulated is evidence of malice.

Gathercole v. *Miall*, 15 M. & W. 319 ; 15 L. J. Ex. 179 ; 10 Jur. 337.

A shareholder in a railway company himself invited reporters for the press to attend a meeting of the shareholders which he had summoned, and at which he made an attack upon one of the directors. *Held*, that the privilege was lost thereby.

Parsons v. *Surgey*, 4 F. & F. 247.

And see *Davis* v. *Cutbush and others*, 1 F. & F. 487.

Defendant having lost certain bills of exchange, published a handbill, offering a reward for their recovery, and adding that he believed they had been embezzled by his clerk, His clerk at that time still attended regularly at his office. *Held*, that the concluding words of the handbill were quite unnecessary to defendant's object, and were a gratuitous libel on the plaintiff. Damages £200.

Finden v. *Westlake*, Moo. & Malk. 461.

Defendant accused the plaintiff, in the presence of a third person, of stealing his wife's brooch ; plaintiff wished to be searched ; defendant repeated the accusation to two women, who searched the plaintiff and found nothing. Subsequently, it was discovered that defendant's wife had left the brooch at a friend's house. *Held*, that the mere publication to the two women did not destroy the privilege attaching to charges, if made *bonâ fide* ; but that all the circumstances should have been left to the jury.

Padmore v. *Lawrence*, 11 A. & E. 280 ; 4 Jur. 458 ; 3 P. & D. 209.

And see *Amann* v. *Damm*, 8 C. B. N. S. 597 ; 29 L. J. C. P. 313 ; 7 Jur. N. S. 47 ; 8 W. R. 470.

The justices were about to swear in the plaintiff as a paid constable, when defendant, a parishioner, came forward and stated that the plaintiff was an improper person to be a constable. *Held*, that the fact that several other persons besides the justices were present, as usual, did not destroy the privilege attaching to such *bonâ fide* remark.

Kershaw v. *Bailey*, 1 Ex. 743 ; 17 L. J. Ex 129.

The fact that defendant's wife was present on a privileged occasion, and heard what her husband said, will not take away the privilege, so long as her presence, though unnecessary, was not improper.

Jones v. *Thomas*, 34 W. R. 104 ; 53 L. T. 678 ; 50 J. P. 149.

Where a master about to dismiss his servant for dishonesty calls in a friend to hear what passes, the presence of such third party will not destroy the privilege.

Taylor v. *Hawkins*, 16 Q. B. 308 ; 20 L. J. Q. B. 313 ; 15 Jur. 746.

Where a master discharged his footman and cook, and they asked him his

reason for doing so, and he told the footman, in the absence of the cook, that "he and the cook had been robbing him," and told the cook in the absence of the footman that he had discharged her "because she and the footman had been robbing him." *Held*, that these were privileged communications as respected the absent parties, as well as those to whom they were respectively made.

Manby v. *Witt* } 18 C. B. 544; 25 L. J. C. P. 294; 2 Jur. N. S.
Eastmead v. *Witt* } 1004.

[*290] The defendant in a petition to the House of Commons charged the plaintiff with extortion and oppression in his office of vicar-general to the Bishop of Lincoln. Copies of the petition were printed and delivered to the members of the committee appointed by the House to hear and examine grievances, in accordance with the usual order of proceeding in the House. No copy was delivered to any one not a member of Parliament. *Held*, that the petition was privileged, although the matter contained in it was false and scandalous; and so were all the printed copies: for, though the printing was a publication to the printers and compositors, still it was the usual course of proceeding in Parliament; and it was not so great a publication as to have so many copies transcribed by several clerks.

Lake v. *King*, 1 Lev. 240: 1 Saund. 131; Sid. 414; 1 Mod. 58.

See *Lawless* v. *Anglo-Egyptian Cotton and Oil Co., Limited*, L. R. 4 Q. B. 262; 10 B. & S. 229; 38 L. J. Q. B. 129; 17 W. R. 498; *ante*, p. 246.

[* 291]

CHAPTER X.

DAMAGES.

Damages are of two kinds :—

(i.) General.
(ii.) Special.

General Damages are such as the law will presume to be the natural or probable consequences of the defendant's words ; they need not therefore be proved by evidence.

Special Damages are such as the law will not infer from the nature of the words themselves ; they must therefore be especially claimed on the pleadings, and evidence of them must be given at the trial. Such damages depend upon the special circumstances of the case, upon the defendant's position, upon the conduct of third persons, &c., &c. Very probably they would not have been incurred, had the same words been spoken on another occasion, or to different hearers.

In some cases special damage is also a necesary element in the cause of action. When on the face of them the words used by the defendant clearly must have injured the plaintiff's reputation, they are said to be actionable *per se* ; and the plaintiff may recover a verdict for a substantial amount, without giving any evidence of actual pecuniary loss. But where the words are not on the face of them such as the courts will presume to be necessarily prejudicial to the plaintiff's reputation, their evidence must be given to show that in fact some appreciable injury has in this case [* 262] followed from their use, or the plaintiff will be nonsuited. The injury to the plaintiff's reputation is the gist of the action ; he has to show that his character has suffered through the defendant's false assertions ; and where there is no presumption in plaintiff's favour, he can only show this by giving evidence of some special damage.

It will be convenient to divide this chapter into the following heads :—

I.—General Damages.

II.—Special Damage, where the words are not actionable *per se*.

III.—Special damage, where the words are actionable *per se*.

IV.—Evidence for the plaintiff in aggravation of damages :—

V.—Evidence for the defendant in mitigation of damages.

(i.) Evidence falling short of a justification.
(ii.) Previous publication by others.
(iii.) Liability of others.
(iv.) Absence of malice.
(v.) Plaintiff's bad character.
(vi.) Absence of special damage.
(vii.) Apology and amends.

VI.—Remoteness of damages.

[*293] I.—General Damages.

General Damages are such as the law will presume to be the natural or probable consequence of the defendant's conduct. They arise by inference of law; and need not therefore be proved by evidence. Such damages may be recovered wherever the immediate tendency of the words is to impair the plaintiff's reputation, although no actual pecuniary loss has in fact resulted.

Such general damages will only be presumed where the words are actionable *per se*. If any special damage has also been suffered, it should be set out on the pleadings; but, should plaintiff fail in proving it at the trial, he may still of course resort to and recover general damages. (*Cook* v. *Field*, 3 Esp. 133; *Smith* v. *Thomas*, 2 Bing. N. C. 372, 380; 2 Scott, 546; 4 Dowl. 333; 1 Hodges, 353; *Brown* v. *Smith*, 13 C. B. 596; 22 L. J. C. P. 151; 17 Jur. 807; 1 C. L. R. 4.)

The jury should carefully consider the whole of the words complained of, and give the plaintiff such damages as in their opinion will fairly compensate him for the injury done to his reputation thereby. The amount of damages is "peculiarly the province of the jury." (*Davis & Sons* v. *Shepstone*, 11 App. Cas. at p. 191; 55 L. T. at p. 2.) They will of course be influenced by the circumstances attending the publication, by the character of the defamatory words, by their falseness, by the malice displayed by the defendant, or the provocation given by the plaintiff. They may also fairly take into their consideration the rank and position in society of the parties, the mode of publication selected, the extent and long continuance of the circulation given to the defamatory words, the tardiness or inadequacy, or entire absence, of any apology, the fact that the defendant could have easily ascer-
[*294] tained that the charge he made was false, &c., &c. Where the words affect a trader in the way of his trade, figures may be laid before the jury, showing that his business has fallen off in consequence. (*Harrison* v. *Pearce*, 1 F. & F. 569; *Evans* v. *Harries*, 1 H. & N. 251; 26 L. J. Ex. 31; *Ingram* v. *Lawson*, 6 Bing. N. C.

212; 8 Scott, 471; 4 Jur. 151; 9 C. & P. 326; *post*, p. 308.) Even if no evidence be offered by the plaintiff as to damages, the jury are in no way bound to give *nominal* damages only; they may read the libel and give such substantial damages as will compensate the plaintiff for such defamation. (*Tripp* v. *Thomas*, 3 B. &. C. 427.)

The damages which the jury award a plaintiff may be either,—

(i.) contemptuous,
(ii.) nominal,
(iii.) substantial, or
(iv.) vindictive.

(i). *Contemptuous* damages are awarded when the jury consider that the action should never have been brought. The defendant may have just overstepped the line, but the plaintiff is also somewhat to blame in the matter, or has rushed into litigation unnecessarily; so he only recovers a farthing or a shilling. There is no necessary inconsistency in a jury finding that a libel was written maliciously and yet awarding only a farthing damages. (*Cooke* v. *Brodgen & Co.* 1 Times L. R. 497.)

(ii.) *Nominal* damages are generally awarded on a compromise, where the plaintiff has not suffered any special damage and does not desire to put money into his pocket; he has cleared his character and is content to accept forty shillings and his costs.

(iii.) *Substantial* damages are awarded where the jury seriously endeavour, as men of business, to arrive at a figure which will fairly compensate the plaintiff for the injury he has sustained.

[*295] (iv.) *Vindictive* or *retributory* or *exemplary* damages are awarded where the jury desire to mark their sense of the defendant's harsh and unfeeling conduct, by fining him to a certain extent; they therefore punish the defendant by awarding the plaintiff damages in excess of the amount which would be adequate compensation for the injury inflicted on his reputation. Thus, in a recent case, where a letter was sent privately to one person only, on whom it made no impression, as she did not believe a word contained in it, the jury yet awarded £3,000, on the ground that "there must have been some vindictiveness." (*Adams* v. *Coleridge*, 1 Times L. R. at p. 87.) It is clearly competent to a jury to find vindictive damages in an action of libel or slander. (*Lord Townshend* v. *Hughes*, 2 Mod. 150; *Emblen* v. *Myers*, 6 H. & N. 54; 30 L. J. Ex. 71; *Bell* v. *Midland Rail. Co.*, 10 C. B. N. S. 287; 30 L. J. C. P. 273; 9 W. R. 612; 4 L. T. 293.)

"The damages in such an action are not limited to the amount of pecuniary loss which the plaintiff is able to prove." (*Davis & Sons* v. *Shepstone*, 11 App. Cas. at p. 191; 55 L. J. C. 51; 34 W. R. 722; 55 L. T. at p. 2.)

The jury must assess the damages once for all (*Gregory and another* v. *Williams*, 1 C. & K.) 568; no fresh action can be brought for any subsequent damage (*Fitter* v. *Veal*, 12 Mod. 542; B. N. P. 7), except where the words are not actionable *per se* (*post*, p. 306). They should, therefore, take into their consideration not only the

damage that has accrued, but also such damage, if any, as will arise from the defamatory words in the future. (*Lord Townshend* v. *Hughes*, 2 Mod. 150 ; *Ingram* v. *Lawson*, 6 Bing. N. C. 212 ; 8 Scott, 471, 477 ; 4 Jur. 151 ; 9 C. & P. 326.) They should compensate the plaintiff for every loss which would naturally result from the words employed ; but not for merely problematical damages that may possibly happen but probably will not. (Per De Grey, C. J., in *Onslow* v. *Horne*, 3 Wils. 188 ; 2 W. Bl. 753 ; and Bayley, B., in [*296] *Lumby* v. *Allday*, 1 C. & J. 305 ; 1 Tyr. 217 ; and see *Doyley* v. *Roberts*, 3 Bing. N. C. 835 ; 5 Scott, 40 ; 3 Hodges, 154 ; *Darley Main Colliery Co.* v. *Mitchell*, 11 App. Cas. 127 ; 55 L. J. Q. B. 539 ; 54 L. T. 882.)

Where the Statute of Limitations is relied on as a defence, but proof is given that one copy has been sold by the defendant within the last few months, the judge is not bound, it is said, to direct the jury to limit the damages to the injury which the plaintiff may be supposed to have incurred from that single publication, but they will take all the circumstances into their consideration. (*Duke of Brunswick* v. *Harmer*, 14 Q. B. 185 ; 19 L. J. Q. B. 20 ; 14 Jur. 110 ; 3 C. & K. 10.)

The jury in assessing damages ought not to take into consideration the question of costs. That is a matter entirely for the judge (*post*, p. 365). Unless he interferes, a farthing will carry costs as much as £1,000. (1 Times L. R. 413.) It is for the jury to say, if they find for the plaintiff, to what extent he has been damaged, irrespective of the effect, if any, which their verdict may have on the subsequent action of the judge. (Per Bramwell, B., L. R. 1 Q. B. 691, 692.)

The amount at which general damages are to be assessed lies almost entirely in the discretion of the jury ; the courts will never interfere with the verdict merely because the amount is excessive. A new trial will only be granted where the verdict is so large as to satisfy the court that it was perversely in excess or the result of some gross error on a matter of principle ; it must be shown that the jury either misconceived the case or acted under the influence of undue motives. So, again, where the damages awarded appear strangely small, a new trial will not be granted, unless it is clearly proved that the jury wholly omitted to take into their consideration some element of damage ; or unless the smallness of the amount shows that the jury made a compromise, and did not really try the issue submitted to them. (*Falvey* v. *Stanford*, L. R. 10 Q. B. 54 ; 44 L. J. Q. B. 7 ; 23 W. R. 162 ; 31 L. T. 677 ; *Kelly* v. *Sherlock*, L. R. 1 Q. B. 686, 697 ; 35 L. J. Q. B. 209 ; 12 Jur. N. S. 937 ; *Forsdike and wife* v. [*297] *Stone*, L. R. 3 C. P. 607 ; 37 L. J. C. P. 301 ; 16 W. R. 976 ; 18 L. T. 722.) But where the plaintiff is entitled to substantial damages, and the verdict in his favour cannot be impeached except on the ground that the damages are excessive, the court has power to refuse a new trial, on the plaintiff alone, and without the defendant, consenting to the damages being reduced to such an amount as the court would consider

not excessive, had they been given by the jury. (*Belt* v. *Lawes* (C. A.), 12 Q. B. D. 356 ; 53 L. J. Q. B. 249 ; 32 W. R. 607 ; 50 L. T. 441.)

II.—Special Damage where the words are not actionable per se.

Special Damage is such a loss as the law will not *presume* to have followed from the defendant's words, but which depends, in part at least, on the special circumstances of the case. It must therefore be proved by evidence at the trial ; and should always be explicitly claimed on the pleadings. In the vast majority of cases proof of special damage is not essential to the right of action. Thus it is not necessary to prove special damage—

(i.) In any action of libel.

(ii.) Whenever the words spoken impute to the plaintiff the commission of any indictable offence.

(iii.) Or a contagious disease.

(iv.) Or are spoken of him in the way of his profession or trade or disparage him in an office of public trust.

Such words, from their natural and immediate tendency to produce injury, the law adjudges to be defamatory, although no special loss or damage is, or can be, proved. Though even in these cases, if any special damage has in fact accrued, the plaintiff may of course prove it to aggravate the damages.

But in all cases not included in any of the above four classes, proof of special damage is essential to the cause of [* 298] action ; for the words are not actionable *per se*. The words do not, apparently and upon the face of them, import such defamation as will of course be injurious ; it is necessary, therefore, that the plaintiff should aver and prove that some particular damage has in fact resulted from their use. Such damage, being essential to the action, must have accrued before action brought. A mere apprehension of future loss cannot constitute special damage. "I know of no case where ever an action for words was grounded upon eventual damages which may possibly happen to a man in a future situation," says De Grey, C. J., in *Onslow* v. *Horne*, 3 Wils. 188 ; 2 W. Bl. 753. It must also be the natural, immediate, and legal consequence of the words which the defendant uttered. (*See Remoteness of Damages, post*, pp. 325—336.)

The special damage necessary to support an action for defamation, where the words are not actionable in themselves, must be the loss of some material temporal advantage. The loss of a marriage, of employment, of custom, of profits, and even of gratuitous entertainment and hospitality, will constitute special damage ; but not mere annoyance or loss of peace of mind, nor even physical illness occasioned by the defamatory charge.

Such loss may be either the loss of some right or position already acquired, or the loss of some future benefit or advantage the acquisition of which is prevented. Thus, if the defendant causes a servant to lose his situation, or prevents his getting one, by

maliciously giving a false character ; in either case an action will lie, though the words be not actionable *per se*. So if he prevent either a new comer from going to the plaintiff's shop, or an old customer from continuing to deal there, that will be sufficient special damage. But the plaintiff must always clearly prove that the loss is the direct result of defendant's words, and not the consequence of some independent act, some spontaneous resolve, of a third person.

Illustrations.

[*299] Anthony Elcock, citizen and mercer of London, of the substance and value of £3,000, sought Anne Davis in marriage ; but the defendant *præmissorum haud ignarus*, accused her of incontinency, wherefore the said Anthony wholly refused to marry the said Anne. *Held*, sufficient special damage. Verdict for the plaintiff for 200 marks.

Davis v. *Gardiner*, 4 Rep. 16 ; 2 Salk. 294 ; 1 Roll. Abr. 38.

Holwood v. *Hopkins*, Cro. Eliz. 787 ; *post*, p. 333.

So if a man lose a marriage.

Matthew v. *Crass*, Cro. Jac. 323.

Nelson v. *Staff*, Cro. Jac. 422.

In consequence of defendant slandering the plaintiff, a dissenting minister, his congregation diminished ; but this was held insufficient, as it did not appear that the plaintiff lost any emolument thereby.

Hopwood v. *Thorn*, 19 L. J. C, P. 94 ; 8 C. B. 293 ; 14 Jur. 87.

But see *Hartley* v. *Herring*, 8 T. R 130, *post*, p. 308.

"If a divine is to be presented to a benefice, and one, to defeat him of it, says to the patron, 'that he is a heretic, or a bastard, or that he is excommunicated,' by which the patron refuses to present him (as he well might if the imputations were true), and he loses his preferment, he shall have his action on the case for those slanders tending to such end."

Davis v. *Gardiner*, 4 Rep. 17.

Loss of a situation will constitute special damage.

Martin v. *Strong*, 5 A. & E. 535 ; 1 N. & P. 29 ; 2 H. & W. 336.

Rumsey v. *Webb et ux.*, 11 L. J. C. P. 129 ; Car. & M. 104.

Or of a chaplaincy.

Payne v. *Beaumorris*, 1 Lev. 248.

If, however, the dismissal from service be colourable only, the master intending to take the plaintiff back again, as soon as the action is over, and having dismissed him solely in order that he might show special damage at the trial ; this is no evidence that the plaintiff's reputation has been impaired, but rather the contrary. If, therefore, no other special damage can be proved, the plaintiff should be nonsuited.

Coward v. *Wellington*, 7 C. & P. 531.

If a man be refused employment through defendant's slander, this is sufficient special damage.

Sterry v. *Foreman*, 2 C. & P. 592.

So, if a person who formerly had dealt with the plaintiff on credit refuses, in consequence of defendant's words, to deliver to the plaintiff certain goods he had ordered until plaintiff has paid for them.

Brown v. *Smith*, 13 C. B. 596 ; 22 L. J. C. P. 151 ; 17 Jur. 807 ; 1 C. L. R. 4.

King v. *Watts*, 8 C. & P. 614.

So, if the agent of a certain firm going to deal with the plaintiff be stopped and dissuaded by the defendant, and this, although such firm subsequently became bankrupt, and paid but 12*s*. 6*d*. in the £, so that had plaintiff obtained the order he would have lost money by it.

Storey v. *Challands*, 8 C. & P. 234.

[*300] The loss of the hospitality of friends gratuitously afforded is sufficient special damage.

Moore v. *Meagher*, 1 Taunt. 39 ; 3 Smith, 135.

Davies and wife v. *Solomon*, L. R. 7 Q. B. 112; 41 L. J. Q. B. 10; 20 W. R. 167; 25 L. T. 799.

So is the loss of any gratuity or present, if it be clear that the slander alone prevented its receipt.

Bracebridge v. *Watson*, Lilly, Entr. 61.

Hartley v. *Herring*, 8 T. R. 130.

In consequence of defendant's words, a friend who had previously voluntarily promised to give the plaintiff, a married woman, money to enable her to join her husband in Australia, whither he had immigrated three years before, refused to do so. *Held*, sufficient special damage.

Corcoran and wife v. *Corcoran*, 7 Ir. C. L. R. 272.

The defendant said of a married man that he had had two bastards: "by reason of which words discord arose between him and his wife, and they were likely to have been divorced." *Held*, that this constituted no special damage.

Barmund's Case, Cro. Jac. 473.

The plaintiff was a candidate for membership of the Reform Club, but upon a ballot of the members was not elected; subsequently a meeting of the members was called to consider an alteration of the rules regarding the election of members; before the day fixed for the meeting, the defendant spoke certain words concerning the plaintiff which "induced or contributed to inducing a majority of the members of the club to retain the regulations under which the plaintiff had been rejected, and thereby prevented the plaintiff from again seeking to be elected to the club." *Held*, that the damage alleged was not pecuniary or capable of being estimated in money, and was not the natural and probable consequence of the defendant's words.

Chamberlain v. *Boyd* (C. A.), 11 Q. B. D. 407; 52 L. J. Q. B. 277; 31 W. R. 572; 48 L. T. 328; 47 J. P. 372.

So where the words are not actionable *per se*, and no pecuniary damage has followed, no compensation can be given for outraged feelings, nor for sickness induced by such mental distress, even though followed by a doctor's bill.

Allsop v. *Allsop*, 5 H. & N. 534; 29 L. J. Ex. 315; 6 Jur. N. S. 433; 8 W. R. 449; 36 L. T. (Old S.) 290.

Lynch v. *Knight and wife*, 9 H. L. C. 577; 8 Jur. N. S. 724; 5 L. T. 291.

Loss of the *consortium* of a husband is special damage. Per Lords Campbell and Cranworth in

Lynch v. *Knight and wife*, 9 H. L. C. at p. 589.

But not merely of the society of friends and neighbours.

Medhurst v. *Balam*, cited in 1 Siderfin, 397.

Barnes v. *Prudlin or Bruddel*, 1 Lev. 261; 1 Sid. 396; 1 Ventr. 4; 2 Keb. 451.

Hence, even the fact that the plaintiff has been expelled from a religious society of which she was a member, will not constitute special damage.

Roberts et ux. v. *Roberts*, 5 B. & S. 384; 33 L. J. Q. B. 249; 10 Jur. N. S. 1027; 12 W. R. 909; 10 L. T. 602.

Though there is an old case in which a vicar in open church falsely declared [*301] that the plaintiff, one of his parishioners, was excommunicated, and refused to celebrate divine service till the plaintiff departed out of the church, whereby the plaintiff was compelled to quit the church, and was scandalized, and was hindered of hearing divine service for a long time; and it was held that an action lay.

Barnabas v. *Traunter* (1641), 1 Vin. Abr. 396.

This case was not cited to the Court in *Roberts* v. *Roberts*.

The plaintiff in a recent case alleged that in consequence of defendant's words "she had suffered considerable annoyance, trouble, disgrace, loss of friends, credit and reputation." *Held*, that this was no special damage.

Weldon v. *De Bathe*, 33 W. R. 328; 14 Q. B. D. 339; 54 L. J. Q. B. 113; 53 L. T. 520.

So in Ireland.

Plaintiff alleged that she had been a novice in a convent, and left in order to nurse a sick relative; defendant said of her that she had left her home because

she was pregnant; whereby the plaintiff alleged she was prevented from returning to the convent and becoming a nun, when she would have been maintained and supported by the society; and had also been brought into disgrace among her neighbours and friends, and had been deprived of and ceased to receive their hospitality. *Held*, that no action lay, as the plaintiff was neither a nun nor a novice at the time the words were spoken, and there was no evidence of special damage sufficient in law to maintain the action.

Dwyer v. *Meehan*, 18 L. R. Ir. 138.

The law is the same in America.

The refusal of civil entertainment at a public-house was held sufficient special damage.

Olmsted v. *Miller*, 1 Wend. 506.

So was the fact that the plaintiff was turned away from the house of her uncle, where she had previously been a welcome visitor, and charged not to return till she had cleared up her character.

Williams v. *Hill*, 19 Wend. 305.

So was the circumstance that persons who had been in the habit of so doing refused any longer to provide food and clothing for the plaintiff.

Beach v. *Ranny*, 2 Hill (N. Y.), 309.

The defendant told Neiper that the plaintiff committed adultery with Mrs. Fuller. Neiper had married Mrs. Fuller's sister, and was an intimate friend of the plaintiff's. Neiper thought it his duty to tell the plaintiff what people were saying of him. Plaintiff, who was hoeing at the time, turned pale, felt bad, flung down his hoe, and left the field; lost his appetite, turned melancholy, could not work as he used to do, and had to hire more help. *Held*, that such mental distress and physical illness were not sufficient to constitute special damage; for they did not result from any injury to the plaintiff's reputation, which had affected the conduct of others towards him. The Court said, in giving judgment, "It would be highly impolitic to hold all language, wounding the feelings and affecting unfavourably the health and ability to labour, of [*302] another, a ground of action: for that would be to make the right of action depend often upon whether the sensibilities of a person spoken of are easily excited or otherwise; his strength of mind to disregard abusive insulting remarks concerning him, and his physical strength and ability to bear them. Words which would make hardly an impression on most persons, and would be thought by them, and should be by all, undeserving of notice, might be exceedingly painful to some, occasioning sickness and an interruption of ability to attend to their ordinary avocations."

Terwilliger v. *Wands*, 3 Smith (17 N. Y. R.), 54, overruling *Bradt* v. *Towsley*, 13 Wend. 253, and *Fuller* v. *Fenner*, 16 Barb. 333.

So, too, a husband cannot maintain an action for the loss of his wife's services caused by illness or mental depression resulting from defamatory words not actionable *per se* being spoken of her by the defendant. For the wife, if *sole*, could have maintained no action. "The facility with which a right to damages could be established by pretended illness where none exists, constitutes a serious objection to such an action as this." Per Denio, J., in

Wilson v. *Goit*, 3 Smith (17 N. Y. R.), 445.

Special damage must always be explicitly claimed on the pleadings and strictly proved at the trial. And where the words are not actionable *per se*, the plaintiff will be confined to the special damage laid; he must either prove that, or be nonsuited; as there are no general damages to which he can have recourse. And when the special damage is proved, the jury should strictly find a verdict for the amount of such special damage merely. They ought not to compensate the plaintiff for pain, mental anxiety, or a general loss of reputation, but should confine their assessment to the actual pecuniary loss that has been alleged and proved. (*Dixon* v. *Smith*,

5 H. & N. 450 ; 29 L. J. Ex. 125.) This rule, however, is frequently neglected in practice ; and as soon as *any* special is proved, the words are treated as though they were actionable *per se*.

To allege generally that in consequence of the defendant's words the plaintiff has lost a large sum of money or that his practice or business has declined, is not a sufficiently precise allegation of special damage. The names of the persons who have ceased to employ the plaintiff, or who would have commenced to deal with him, had not the defendant dissuaded them, must be set out in the statement of claim, or in the particulars ; and they must themselves [*303] be called as witnesses at the trial to state their reason for not dealing with the plaintiff. Else it will not be clear that their withholding their custom was in consequence of defendant's words; it might well be due to some other cause. (Per Lord Kenyon, C. J., in *Ashley* v. *Harrison*, 1 Esp. at p. 50 ; per Best, C. J., in *Tilk* v. *Parsons*, 2 C. & P. 201.) If the plaintiff cannot give the names of those who have ceased to deal with him, or cannot prove that their so ceasing is due to the defendant's words, he must be non-suited ; although there has in fact been a falling off in his business.

And here note the distinction between the loss of individual customers, and a general diminution in annual profits. Loss of custom is special damage, and must be specifically alleged, and the customers' names stated on the record ; if that be done, the consequent reduction in plaintiff's annual income can easily be reckoned. But if no names be given, it is impossible to connect the alleged diminution in the general profits of plaintiff's business with defendant's words ; it may be due to fluctuations in prices, to a change of management, to a new shop being opened in opposition, or to many other causes. Hence such an indefinite loss of business is considered general damage, and can only be proved where the words are spoken of the plaintiff in the way of his trade, and so are actionable *per se*. For there the law presumes that such words must injure the plaintiff's business ; and therefore attributes to those words the diminution it finds in plaintiff's profits. (*Harrison* v. *Pearce*, 1 F. & F. 567 ; 32 L. T. (Old S.) 298.)

There is no hardship in this rule; and it should be strictly observed. The loss to the plaintiff must be directly connected with the defendant's utterance of the words. If others repeat his words, with or without additions of their own, the defendant is not liable for the consequences of what they say. And it is only by such repetitions that a general loss of business can be brought about. It is true that many traders, such as innkeepers, tobacconists, and others, seldom know the names of their customers, who are often chance passers-by. It might therefore be urged that such traders should never be required to state the names of particular customers, whether the words be actionable *per se* or not. This is the law in Victoria apparently. (See *Brady* v. *Youlden*, *post*, p. 306.) And in *Riding* v. *Smith*, 1 Ex. D. 91 ; 45 [*304] L. J. Ex. 281 ; 24 W. R. 487 ; 34 L. T. 500, Kelly, C. B., after stating with great clearness that "the words would not be actionable as slander without proof of special damage,

which must be established not merely by general evidence that the business has fallen off, but by showing that particular persons have ceased to deal with the plaintiff,"—yet held that such evidence was properly received in the case before him, which he deemed an action on the case, and not an action of defamation. But it is clear that the late Lord Chief Baron did not mean to lay down any general rule, and that *Riding* v. *Smith* is not to be regarded as an authority in actions of defamation, but merely as an exceptional case depending upon its own peculiar facts. In a very similar case, *Kent* v. *Stone*, Bristol Summer Assizes, 1880, Lord Coleridge, C. J., refused to follow *Riding* v. *Smith* on this point, as being contrary to all previous decisions. In *Clark* v. *Morgan*, 38 L. T. 354, Grove, J., points out the anomaly which would follow if the rule in *Riding* v. *Smith* were universally carried out. The defendant has spoken to A. words which are not actionable *per se*; *i. e.*, words of such a character that the law will not presume that they can injure the plaintiff. A. repeats them to B., B. to C., C. to D., and so on, until at last the plaintiff's business declines. If B., C., and D. were called, they would state that they never heard a word from the defendant on the matter; and then it is clear law that the jury could only award the plaintiff damages for the loss of A.'s custom, A. being the one man to whom defendant spoke. (*Dixon* v. *Smith*, 5 H. & N. 450; 29 L. J. Ex. 125: *Bateman and Wife* v. *Lyall and Wife*, 7 C. B. N. S. 638; *Hirst* v. *Goodwin*, 3 F. & F. 257.) And yet, by merely keeping them out of the box, the plaintiff would (if *Riding* v. *Smith* be adopted as a general authority in cases of slander) illegally recover damages for the loss of the custom of B., C., D., E., and F. Lindley, J., in the same case (38 L. T. 355) expresses his opinion that the decisions in *Ward* v. *Weeks* and *Parsons* v. *Scott* have in no way been overruled by *Riding* v. *Smith* and *Evans* v. *Harris*.

As a rule, words which cause loss of custom to a trader are spoken of him in the way of his trade, and are therefore actionable *per se*. And in other cases of special damage there is no difficulty; for the plaintiff must know the names of the master who has dismissed him, and of the friends who formerly showed him hospitality.

Illustrations.

The plaintiff alleged that in consequence of the defendant's slander, she had "lost several suitors." This was held too general an allegation; for the names [* 305] of the suitors, if there were any, could hardly have escaped the plaintiff's memory.

Barnes v. *Prudlin, vel Bruddel*, 1 Sid. 396; 1 Ventr. 4; 1 Lev. 261; 2 Keb. 451.

See, also, *Hunt* v. *Jones*, Cro. Jac. 499.

Davies and wife v. *Solomon*, L. R. 7 Q. B. 112; 41 L. J. Q. B. 10; 20 W. R. 167; 25 L. T. 799.

The defendant slandered a dissenting minister, who averred that his congregation diminished in consequence. *Held*, too general an averment to constitute special damage, the names of the absentees not being given.

Hopwood v. *Thorn*, 8 C. B. 293; 19 L. J. C. P. 94; 14 Jur. 87.

Such an averment would have been sufficient, had the words been spoken of the plaintiff in the way of his office, and so actionable *per se*.

Hartley v. *Herring*, 8 T. R. 130.
Evans v. *Harries*, 1 H. & N. 254; 26 L. J. Ex. 31.

Dawes intended to employ the plaintiff, a surgeon and accoucheur, at his wife's approaching confinement; but the defendant told Dawes that the plaintiff's female servant had had a child by the plaintiff: Dawes consequently decided not to employ the plaintiff: Dawes told his mother and his wife's sister what defendant had said; and consequently the plaintiff's practice fell off considerably among Dawes' friends and acquaintances and others. The fee for one confinement was a guinea. *Held*, that the plaintiff was entitled to more than the one guinea; the jury should give him such a sum as they considered Dawes' custom was worth to him; but that the plaintiff clearly could not recover anything for the general decline of his business, which was caused by the gossip of Dawes' mother and sister-in-law.

Dixon v. *Smith*, 5 H. & N. 450; 29 L. J. Ex. 125.

The law is the same in America.

The plaintiff alleged that the defendant's words had "injured her in her good name, and caused her relatives and friends to slight and shun her." This was held to disclose no special damage.

Bassell v. *Elmore*, 48 N. Y. R. 563; 65 Barb. 627.
Geisler v. *Brown*, 6 Neb. 254.

So where the allegation was merely that by reason of defendant's words "the plaintiff had been slighted, neglected, and misused by the neighbours and her former associates and turned out of doors."

Pettibone v. *Simpson*, 66 Barb. 492.

A general allegation that by reason of defendant's acts, plaintiff had been compelled to pay a large sum of money, without showing how, was held insufficient.

Cook v. *Cook*, 100 Mass. 194.
Pollard v. *Lyon*, 1 Otto (91 U. S.), 225.

But in Australia a different rule apparently prevails.

To say to the keeper of a restaurant, "You are an infernal rogue and swindler," [* 306] was held, in the Supreme Court of Victoria, not actionable without proof of special damage, as not affecting plaintiff in his trade. But the plaintiff having alleged that, by reason of the words, people who used to frequent his restaurant ceased to deal with him, it was held the special damage made the words actionable, and that the special damage was sufficiently alleged; that the cases of frequenters of theatres, members of congregations, and travelers using an inn, were exceptions to the rule requiring the names of the customers lost to be set forth.

Brady v. *Youlden*, Kerferd & Box's Digest of Victoria Cases, 709; Melbourne Argus Reports, 6 Sept. 1867, *sed quære.*

Where the words are not actionable without special damage, the jury, as we have seen, must confine their consideration to such special damage as is specially alleged and proved. It may, therefore, very well be argued that if any fresh damage followed in the future, that would constitute a fresh ground of action. And of this opinion was North, C. J., in *Lord Townshend* vs. *Hughes*, 2 Mod. 150. But Buller, in his "Nisi Prius," p. 7, lays it down most distinctly, that where a plaintiff "has once recovered damages, he cannot after bring an action for any other special damage, whether the words be in themselves actionable or not." And Lord Holt is certainly reported as saying so *obiter* in *Fitter* v. *Veal*, 12 Mod. 542; not in the other reports, 1 Ld. Raym. 339, 692; 1 Salk. 11. The matter was much discussed in *Darley Main Colliery Co.* v. *Mitchell*, 11

App. Cas. 127 ; 55 L. J. Q. B. 529 ; 54 L. T. 882, and Lord Blackburn unfortunately differed from Lord Bramwell (11 App. Cas. pp. 143, 145). I think, however, after the decision in that case, the better opinion is that a second action will lie for fresh special damage.

III.—Special Damage where the words are actionable per se.

Where special damage is not essential to the action, it may still of course be proved at the trial to aggravate the damages, if it has been properly pleaded. The same particularity is required whether the words be actionable *per se* or not. So, too, plaintiff must still prove that the special damage alleged is the direct result of the defendant's words, and not of any repetition of them by others. (*Tunnicliffe* v. *Moss*, 3 C. & K. 83 ; *Hirst* v. *Goodwin*, 3 F. & F. 257.) But in other respects the law is not quite [* 307[so strict as to what constitutes special damage in the first case as in the second.

Thus, where the words are *not* actionable *per se*, we have seen that mental distress, illness, expulsion from a religious society, &c., do not constitute special damage. But where the words are actionable *per se*, the jury may take such matters into their consideration in according damages. "Mental pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes *that alone ;* though where a material damage occurs, and is connected with it, it is impossible a jury, in estimating it, should altogether overlook the feelings of the party interested." (Per Lord Wensleydale, in *Lynch* v. *Knight and wife*, 9 H. L. C. 598. See also *Haythorn* v. *Lawson*, 3 C. & P. 196 ; *Le Fanu* v. *Malcolmson*, 8 Ir. L. R. 418.) And had the charge against Mrs. Roberts been one of felony, I do not think any judge would have excluded the evidence as to her expulsion from her religious sect.

Again, where words are spoken of the plaintiff in the way of his profession or trade so as to be actionable *per se*, the plaintiff may allege and prove a general diminution of profits or decline of trade, without naming particular customers or proving why they have ceased to deal with him. (*Ingram* v. *Lawson*, 6 Bing. N. C. 212 ; 8 Scott, 471 ; 4 Jur. 151 ; 9 C. & P. 326 ; *Harrison* v. *Pearce*, 1 F. & F. 569 ; 32 L. T. (Old S.) 298 ; and per Cresswell, J., in *Rose* v. *Groves*, 5 M. & Gr. 618, 619.) In *Delegal* v. *Highley*, 8 C. & P. 448, it is true, Tindal, C. J., refused to allow any evidence to be given of general loss of business, on the ground that the law already presumed such loss in the plaintiff's favour ; but this decision must now be considered overruled. Of course, if the plaintiff desires to go into such details at the trial, he may plead them specially and call the customers named as witnesses. Still if the customers are not called at the trial, or if for any other reason the proof of the special damage fails, the plaintiff [* 308] may still fall back on the general damage and prove a loss of income induced by the slander. (*Cook* v. *Field*, 3 Esp. 133 ; *Evans* v. *Harries*, 1 H. & N. 251 ; 26 L. J. Ex. 31.) This he cannot do when the words are not actionable *per se ;* see *ante*. p. 303. But where the law already presumes

that the plaintiff is injured in his business, so that the jury must give him some damages, evidence as to the nature and extent of plaintiff's business before and after publication is clearly admissible to enable the jury to fix the amount.

Lastly, where it is clear that the action lies without proof of any special damage, any loss or injury which the plaintiff has sustained in consequence of defendant's words, even after action brought, may be proved to support the legal presumption, and to show from what has actually occurred how injurious and mischievous those words were.

Illustrations.

Where the defendant advertised in *Hue and Cry* that the plaintiff had been guilty of fraud, and offered a reward for his apprehension, and the plaintiff immediately sued on the libel, and after action brought was twice arrested in consequence of it: he was allowed to give evidence of these two arrests at the trial, not indeed as special damage, for they happened after action brought, but in order to show the injurious nature of the libel, and that the plaintiff was at time of action brought in serious danger of being arrested.

Goslin v. *Corry*, 7 M. & Gr. 342; 8 Scott, N. R. 21.

Where the defendant published in a newspaper that a certain ship of the plaintiff's was unseaworthy, and had been purchased by the Jews to carry convicts, evidence as to the average profits of a voyage was admitted, and also evidence that upon the first voyage after the libel appeared the profits were nearly £1,500 below the average, and this although the action was brought immediately after the libel appeared, and before the last-mentioned voyage was commenced. The jury, however, awarded the plaintiff only £900 damages.

Ingram v. *Lawson*, 6 Bing. N. C. 212; 8 Scott, 471.

Where a declaration alleged that the defendant spoke words of the plaintiff, a dissenting minister, in the way of his office and profession, and his congregation rapidly diminished, and he was compelled for a time to give up preaching altogether, and lost profits thereby; it was held that this was a sufficient allegation of special damage, although the members of his congregation were not named.

Hartley v. *Herring*, 8 T. R. 130.

Hopwood v. *Thorn*, 8 C. B. 293; 19 L. J. C. P. 94; 14 Jur. 87.

[* 309] Where words actionable *per se* are spoken of an innkeeper in the way of his trade, evidence may be given of a general loss of custom and decline in his business.

Evans v. *Harries*, 1 H. & N. 251; 26 L. J. Ex. 31.

"Suppose a biscuit baker in Regent Street is slandered by a man saying his biscuits are poisoned, and in consequence no one enters his shop, He cannot complain of the loss of any particular customers, for he does not know them, and how hard and unjust it would be if he could not prove the fact of the loss under a general allegation of loss of custom." Per Martin, B., in

Evans v. *Harries*, 26 L. J. Ex. 32.

And see *Weiss* v. *Whittemore*, 38 Michigan, 366.

But where defendant charged plaintiff with larceny, and the words were repeated by H. to Carpmole, who in consequence refused to employ plaintiff, evidence of such special damage was rejected.

Tunnicliffe v. *Moss*, 3 C. & K. 83.

Rutherford v. *Evans*, 4 C. & P. 74.

Hirst v. *Goodwin*, 3 F. & F. 257.

IV.—Evidence for the Plaintiff in Aggravation of Damages.

The violence of the defendant's language, the nature of the imputation conveyed, and the fact that the defamation was deliberate

and malicious, will of course enhance the damages. All the circumstances attending the publication may therefore be given in evidence, and any previous transactions between the plaintiff and the defendant which have any direct bearing on the subject-matter of the action, or are a necessary part of the history of the case. The jury will also consider the rank or position in society of the parties, the fact that the attack was entirely unprovoked, that the defendant could easily have ascertained that the charge he made was false, &c. So evidence may be given to show that the defendant was culpably reckless or grossly negligent in the matter. The attention of the jury should especially be directed to the mode, the extent, and the long continuance of publication. Such evidence is admissible with a view to damages, although the publication has been admitted on the pleadings. (*Vines* v. *Serell*, 7 C. & P. 163.) So defendant's subsequent conduct may aggravate the [* 310] damages; *e.g.*, if he has refused to listen to any explanation, or to retract the charge he made, or has only tardily published an inadequate apology.

It must not be assumed, however, that every piece of evidence which is admissible to prove malice when malice is in issue (see c. IX.), is also admissible in aggravation of damages. Thus evidence may be given of antecedent or subsequent libels or slanders to show that a communication *primâ facie* privileged was made maliciously (c. IX., p. 276); and also when evidence is necessary to explain the meaning of language which without it appears ambiguous (c. III., p. 113). But such evidence may *not* be given where the existence of malice is undisputed, and the words of the libel are clear. (*Stuart* v. *Lovell*, 2 Stark. 93; *Pearce* v. *Ornsby*, 1 M. & Rob. 455; *Symmons* v. *Blake*, *ib.* 477; 2 C. M. & R. 416; 4 Dowl. 263; 1 Gale, 182.) And when such evidence *is* admissible, the jury should always be cautioned to give *no* damages in respect of it. (Per Tindal, C. J., in *Pearson* v. *Lemaitre*, 5 M. & Gr. 719; 12 L. J. Q. B. 253; 6 Scott, N. R. 607; 7 Jur. 748; 7 J. P. 336.) It is only when a subsequent libel has immediate reference to the one sued on, that it will be admitted as a necessary part of the *res gestæ*. (*Finnerty* v. *Tipper*, 2 Camp. 72; *May* v. *Brown*, 3 B. & Cr. 113; 4 D. & R. 670.)

The plaintiff cannot give evidence of general good character in aggravation of damages merely, unless such character is put in issue on the pleadings; or has been attacked by the cross-examination of the plaintiff's witnesses; for till then the plaintiff's character is presumed good. (*Cornwall* v. *Richardson*, Ry. & M. 305; *Guy* v. *Gregory*, 9 C. & P. 584, 587; *Brine* v. *Bazalgette*, 3 Ex. 692; 18 L. J. Ex. 348.) But such evidence is admissible under special circumstances to show that the libel was false to the knowledge of the defendant, and must therefore have been written maliciously. (*Fountain* v. *Boodle*, 3 Q. B. 5; 2 G. & D. 455, *post*, p. 569.)

[* 311] In all these cases the malice proved must be that of the defendant. If two be sued, the motive of one must not be allowed to aggravate the damages against the other. (*Clark* v. *Newsam*, 1 Ex. 131, 139.) Nor should the improper motive of an agent be

matter of aggravation against his principal. (*Carmichael* v. *Waterford and Limerick Rail Co.*, 13 Ir. L. R. 313; *Robertson* v. *Wylde*, 2 Moo. & Rob. 101.) So in America. (*Scripps* v. *Reilly*, 38 Mich. 10; *Detroit* v. *McArthur*, 16 Mich. 447.

Illustrations.

If the libel has appeared in a newspaper, proof that the particular number containing the libel was gratuitously circulated in the plaintiff's neighborhood, or that its sale was in any way especially pushed, will enhance the damages.

Gathercole v. *Miall*, 15 M. & W. 319; 15 L. J. Ex. 179; 10 Jur. 337.

If the libel was sold to the public indiscriminately, heavy damages should be given, for the defendant has put it out of his power to recall or contradict his statements, should he desire to do so.

Per Lord Denman, 9 A. & E. at p. 149.

Per Best, C. J., 5 Bing. at p. 402.

And where there is no malice, gross negligence on the part of the proprietor of a newspaper in allowing the libel to appear in its columns, may be proved to enhance the damages.

Smith v. *Harrison*, 1 F. & F. 565.

If other words, injurious and abusive, though not actionable *per se*, were uttered on the same occasion as the words complained of, these other words may be given in evidence as an aggravation of the actionable words. "Where a wrongful act is accompanied by words of contumely and abuse, the jury are warranted in taking that into consideration, and giving retributory damages.

Per Byles, J., in *Bell* v. *Midland Rail Co.*, 10 C. B. N. S. at p. 308.

And see *Dodson* v. *Owen*, 4 Times L. R. *ante*, p. 262.

Blagg v. *Sturt*, 10 Q. B. 899; 16 L. J. Q. B. 39; 11 Jur. 101; 8 L. T. (Old S.) 135.

Merest v. *Harvey*, 5 Taunt. 432, *ante*, p. 615.

The defendant's conduct of his case, even the language used by his counsel at the trial may aggravate the damages.

Per Pollock, C. B., *Darby* v. *Ouseley*, 25 L. J., Ex. 230, 233.

Blake v. *Stevens and others*, 4 F. & F. 235; 11 L. T. 543.

Risk Allah Bey v. *Whitehurst*, 18 L. T. 615.

So a plea of justification, if persisted in, but not proved, will enhance the damages.

Warwick v. *Foulks*, 12 M. & W. 508.

Wilson v. *Robinson*, 7 Q. B. 68; 14 L. J. Q. B. 196; 9 Jur. 726.

Simpson v. *Robinson*, 12 Q. B. 511; 18 L. J. Q. B. 73; 13 Jur. 187.

[*311] ## V.—Evidence for the Defendant in Mitigation of Damages.

(i.) *Evidence falling short of a justification.*

The defendant may also urge upon the jury any material circumstance which he thinks will tend to mitigate the damages against him.

But this is of course subject to the general rule that circumstances, which, if pleaded, would have been a bar to the action, cannot be given in evidence in mitigation of damages. (*Speck* v. *Phillips*, 5 M. & W. 279; 8 L. J. Ex. 277; 7 Dowl. 470.) Evidence of the truth of the slander or libel is therefore inadmissible,

unless a justification is pleaded. (*Underwood* v. *Parks*, 2 Strange, 1200; *Smith* v. *Richardson*, Willes, 20.) And where the words are capable of two meanings, one innocent, the other harmful, no evidence can be given in mitigation of damages that in the innocent sense the words are literally true without an express plea to that effect. (*Rumsey* v. *Webb et ux.*, Car. & M. 104; 11 L. J. C. P. 129.) *A fortiori*, evidence that there was a wide-spread report or rumour to the same effect as the words complained of is inadmissible; for it clearly falls short of a justification, and is moreover objectionable as hearsay. (*Scott* v. *Sampson*, 8 Q. B. D. 491; 51 L. J. Q. B. 380; 30 W. R. 541; 46 L. T. 412; 46 J. P. 408.) But a defendant may, if he place a proper plea on the record, give evidence in mitigation of damages that a certain specified portion of the defamatory words is true, provided such portion conveys a distinct imputation on the plaintiff and is divisible from the rest and yet intelligible by itself. (*M'Gregor* v. *Gregory*, 11 M. & W. 287; 12 L. J. Ex. 204; 2 Dowl. N. S. 769; *Lord Churchill* v. *Hunt*, 2 B. & Ald. 685; 1 Chit. 480; *Clarke* v. *Taylor and another*, 2 Bing. N.C. 654; 3 Scott, 95; 2 Hodges, 65.) But the plea must clearly specify the precise portions justified. (*Stiles* v. *Nokes*, 7 [*313] East, 493.) And without a special plea, evidence that part of the libel is true cannot be received. (*Vessey* v. *Pike*, 3 C. & P. 512.)

(ii.) *Previous publications by others.*

Evidence of previous publications by others is clearly inadmissible even in mitigation of damages; that others besides the defendant have defamed the plaintiff is a wholly irrelevant fact. (*Tucker*, v. *Lawson*, 2 Times L. R. 593.) And so is the fact that on such former occasions the plaintiff did not sue the publisher or take any steps to contradict the charges made against him. (*R.* v. *Newman*, 1 E. & B. 268; 21 L. J. Q. B. 156; 3 C. & K. 252; *R.* v. *Holt*, 5 T. R. 436; *Ingram* v. *Lawson*, 9 C. & P. 333; *Pankhurst* v. *Hamilton*, 2 Times L. R. 682.) And even when the falsehood thus unchallenged grows to a persistent rumour or general report, which the defendant hears, believes, and repeats; this is not regarded in law as a mitigating circumstance. Evidence of any such rumour is altogether inadmissible. (*Scott* v. *Sampson*, 8 Q. B. D. 491; 51 L. J. Q. B. 380; 30 W. R. 541; 46 L. T. 412; 46 J. P. 408.)

There is one exception: if defendant in repeating the story as it reached him gives it as hearsay, and states the source of his information, then, but only then, is the fact that he did not originate the falsehood, but innocently repeated it, allowed to tell in his favour, as proving that he bore the plaintiff no malice. Thus, where it appears on the face of a libel that it is founded on a statement in a certain newspaper, the defendant is entitled to show that he did in fact read such statement in the newspaper and wrote the libel believing such statement to be true. (*R.* v. *Burdett*, 4 B. & Ald. 95; *Mullett* v. *Hulton*, 4 Esp. 248; *Hunt* v. *Algar*, 6 C. & P. 245.) So, if the defendant has named A. as his informant, he may prove in mitigation that he did in fact receive such information from A., though

of course this is no defence to the action ; [*314] (*ante*, p. 162.) (*Bennett* v. *Bennett*, 6 C. & P. 588; *Mills and wife* v. *Spencer and wife* (1817), Holt, N. P. 533; *East* v. *Chapman*, M. & M. 46; 2 C. & P. 570; *Duncombe* v. *Daniell*, 2 Jur. 32; 8 C. & P. 222; 1 W. W. & H. 101; cited 7 Dowl. 472; *Davis* v. *Cutbush and others*, 1 F. & F. 487.) But where the libel does not, on the face of it, purport to be derived from any one, but is stated as of the writer's own knowledge, there evidence is wholly inadmissible to show that it was copied from a newspaper or communicated by a correspondent. (*Talbutt* v. *Clark and another*, 2 Moo. & Rob. 312.) But still if the defendant can show that in copying the libel from another newspaper, he was careful to omit certain passages which reflected strongly on the plaintiff, his conduct in making such omissions is admissible as showing the absence of all *animus* against the plaintiff, and this necessarily involves the admissibility of the original libel copied. (*Creevy* v. *Carr*, 7 C. & P. 64; *Creighton* v. *Finlay*, Arm. Mac. & Ogle (Ir.) 385.) And see *De Bensaude* v. *Conservative Newspaper Co.*, 3 Times L. R. 538.

Illustrations.

Mrs. Evans told Mrs. Spencer that she was going to Mrs. Mills' house to learn dressmaking ; Mrs. Spencer thereupon told Mrs. Evans a few things about Mrs. Mills, which she said Mrs. Lewis and Mrs. Sayer had told her. Gibbs, C. J., would have admitted evidence apparently that these ladies had, in fact, told Mrs. Spencer what she told Mrs. Evans : but it turned out it was somebody else who had said so, and not the two ladies whom she named as her authorities. Evidence of what was said by these third persons, who were not named by Mrs. Spencer when she uttered the words complained of, was excluded.

Mills and wife v. *Spencer and wife*, Holt, N. P. 533.

On the day of the nomination of candidates for the representation of the borough of Finsbury, the defendant published in the *Morning Post* certain facts discreditable to one of the candidates, the plaintiff, which he alleged he had heard from one Wilkinson at a meeting of the electors. *Held*, that Wilkinson was an admissible witness to prove, in mitigation of damages, that he did, in fact, make the statement which the defendant had published at the time and place alleged.

Duncombe v. *Daniell*, 2 Jur. 32; 8 C. & P. 222; 1 W. W. & H. 101.

The *Observer* published an inaccurate report of the trial of action brought against the plaintiff. Defendant copied this report *verbatim* into his paper. [*315] *Held*, that evidence that many other papers beside the defendant's had also copied the statement from the *Observer* was inadmissible.

Saunders v. *Mills*, 6 Bing. 213 ; 3 M. & P. 520.

Tucker v. *Lawson*, 2 Times L. R. 593.

Evidence that defendant had copied it from the *Observer* into his own paper had been admitted apparently without question at the trial ; but in allowing that evidence, Tindal, C. J., says (6 Bing. 220) : "It appeared to me I had gone the full length." In *Talbutt* v. *Clark* (2 Moo. & Rob. 312), Lord Denman says, referring, no doubt, to *Saunders* v. *Mills* : "I know that in a case in the Common Pleas it has been held that a previous statement in another newspaper is admissible ; but even that decision had been very much questioned."

One officer charged another with stealing a watch ; a third officer in the same regiment was called to state that he had previously heard rumours that the plaintiff had stolen that watch, but his evidence was rejected ; and the Court held that such rejection was right (Pigot, C. B., dissenting).

Bell v. *Parke* (1860), 11 Ir. C. L. R. 413.

Kelly, C. B. is reported to have given a similar ruling in

Dobede v. *Fisher*, *Times* for July 29th, 1880.

It is now clearly settled that evidence of such rumours is inadmissible.

Scott v. *Sampson*, 8 Q. B. D. 491; 51 L. J. Q. B. 380; 30 W. R. 541; 46 L. T. 412; 46 J. P. 408.
Wilson v. *Fitch*, 41 Cal. 363.

But where a libel on the plaintiff, who was Surveyor-General of Upper Canada, was contained in a pamphlet which was not generally circulated, copies being sent only to the principal civil officers of the province, one of whom was called as a witness by the plaintiff, Gibbs, C. J., allowed defendant's counsel to ask the witness, whether, previous to the delivery of this pamphlet, he did not read, in a public newspaper, the substance of the libel charged in the declaration. Such cross-examination appears to be still permissible in mitigation of damages; as showing that it was the former publication in the newspaper, and not the subsequent publication of the pamphlet which injured plaintiff's reputation; and see *post*, p. 327; although the pamphlet did not profess to be founded on the newspaper.

Wyatt v. *Gore*, Holt, N. P. 299, 304.

(iii.) *Liability of others.*

If the present defendant is liable, the fact that some one else is also liable is immaterial. It will not diminish the amount recoverable from the present defendant, to show that the plaintiff has recovered, or might recover, other damage from others. For each defendant in his turn pays damages for the injury which he himself has occasioned, not for the injury done by others.

Thus, in cases of slander, the defendant is only liable for such [*316] damages as result directly from his own utterance. If defendant chooses to repeat what another has said, that is his own conscious and voluntary act, for the results of which he alone is responsible. So defendant is not liable for the consequences of any repetition of his words by others. (See *post*, p. 331.) So if two newspapers have made each a distinct charge against the plaintiff, and subsequently the plaintiff finds his business falling off, whichever paper he sues may endeavor to show that the loss of trade is due, or partly due, to the charge made against the plaintiff by the other paper. So if there are two distinct and separate publications of the same libel, a defendant who was concerned in the first publication, but wholly unconnected with the second, will not be liable for any damages which he can prove to have been the consequence of the second publication and in no way due to the first. Hence evidence that plaintiff has already sued those who were liable for the second publication, and recovered damages therefor, is inadmissible in an action brought against defendant on the first publication. (*Creevy* v. *Carr*, 7 C. & P. 64; *Frescoe* v. *May*, 2 F. & F. 123.) So is evidence that other actions are pending against other persons for other publications of the same libel. (*Harrison* v. *Pearce*, 1 F. & F. 567; 32 L. T. (Old S.) 298.)

But where there is only one publication, every one concerned in it is equally liable for all consequent damage. Hence the plaintiff can only bring one action; he cannot recover twice over from different defendants the same damages for the same injury. He may sue one or more or all of the joint publishers in his one action, at his election. Thus, if the libel appeared in a newspaper, the person libelled may sue either the proprietor or the editor, or the

printer, or any two, or all three of them. If he only sue one of many persons liable, it is no defence that others are jointly liable with that one; for all parties concerned in a common wrongful act are jointly and severally liable. (*Post*, p. 516.) But as soon as the plaintiff recovers judgment in the first action, every one who is jointly liable with the actual defendant is released. No second action can be brought on that publication against any one who might have been sued in the first action. (*Brown* v. *Wootton*, Cro. Jac. 73; Yelv. 67; Moo. 762; *Duke of Brunswick* v. *Pepper*, 2 C. & K. 683; *Brinsmead* v. *Harrison*, L. R. 7 C. P. 547; 41 L. J. C. P. 190; 20 W. R. 784; 27 L. T. 99.) Even though the plaintiff was not then aware that such other person was liable. (*Munster* v. *Cox*, 1 Times L. R. 542.)

And there is no contribution between tort-feasors. So that the proprietor of a paper cannot compel his careless editor to recoup him the damages, which he has been compelled to pay the plaintiff. [*317] (*Colburn* v. *Patmore*, 1 C. M. & R. 73; 4 Tyr. 677; *Moscati* v. *Lawson*, 7 C. & P. at p. 35.)

(iv.) *Absence of Malice.*

As a rule, unless the occasion be privileged, the motive or intention of the speaker or writer is immaterial to the right of action: the Court looks only at the words employed and their effect on the plaintiff's reputation. But in all cases, the absence of malice, though it may not be a bar to the action, may yet have a material effect in reducing the damages. The plaintiff is still entitled to reasonable compensation for the injury he has suffered; but if the injury was unintentional, or was committed under a sense of duty, or through some honest mistake, clearly no vindictive damages should be given. In every case, therefore, the defendant may, in mitigation of damages, give evidence to show that he acted in good faith and with honesty of purpose, and not maliciously. (*Pearson* v. *Lemaitre*, 5 M. & Gr. 700; 12 L. J. Q. B. 253; 6 Scott, N. R. 607; 7 Jur. 748; 7 J. P. 336.) He may show that the remainder of the libel not set out on the record modifies the words sued on; or that other passages in the same publication qualify them. But he may not put in passages contained in a subsequent and distinct publication, unless the words sued on are equivocal or ambiguous. (*Cooke* v. *Hughes*, R. & M. 112; *Darby* v. *Ouseley*, 1 H. & N. 1; 25 L. J. Ex. 227; 2 Jur. N. S. 497.) The fact that the defendant did not originate the calumny, but innocently repeated it, is admissible if he gave it as hearsay and named his authority when he repeated it, but not otherwise, as we have seen, *ante*, p. 313. The defendant may also urge that plaintiff's conduct was such as would naturally lead the defendant to put the worst construction on his acts; or that in any other way the plaintiff had, by his conduct, brought the libel on himself. So defendant's subsequent conduct may mitigate [*318] the damages, *e. g.*, if he showed himself open to argument, listened to the explanations that were offered

him, stopped the sale of the libel as soon as complaint reached him, &c., &c.

In some cases, as we have seen, the plaintiff's conduct towards the defendant may be a bar to the action; as where the plaintiff, by attacking the defendant, had provoked a reply which is made honestly in self-defence. (See *ante*, p. 232.) But where the facts do not amount to such a defence, they may still tend to mitigate the damages. "There can be no set-off of one libel or misconduct against another; but in estimating the compensation for the plaintiff's injured feelings, the jury might fairly consider the plaintiff's conduct, and the degree of respect he has shown for the feelings of others." (Per Blackburn, J., in *Kelly* v. *Sherlock*, L. R. 1 Q. B. 698; 35 L. J. Q. B. 213; 12 Jur. N. S. 937.) Thus, evidence is admissible in mitigation of damages to show that plaintiff had previously himself libelled or slandered the defendant, provided it be also shown that this had come to the defendant's knowledge and occasioned his attack on the plaintiff. (*Finnerty* v. *Tipper*, 2 Camp. 76; *Antony Pasquin's case*, cited 1 Camp. 351; *Tarpley* v. *Blabey*, 2 Bing. N. C. 437; 2 Scott, 642; 7 C. & P. 395; *Watts* v. *Fraser*, 7 A. & E. 223; 7 C. & P. 369; 1 M. & Rob. 449; 2 N. & P. 157; *Wakley* v. *Johnson*, Ry. & M. 422.) But not if such previous libels refer to other matters and did not provoke that sued on. (*May* v. *Brown*, 3 B. & C. 113; 4 D. & R. 670; *Sheffill* v. *Van Deusen*, 15 Gray, 485.) The defendant may not branch out into irrelevant matters in his evidence; he may cross-examine plaintiff thereon; but if he does, he must take plaintiff's answer; he cannot call evidence to contradict it.

Where no justification is pleaded, the defendant will not be entitled on the trial to give evidence in chief, with a view to mitigation of damages, as to the circumstances under which the libel or slander was published, or as to the character of the plaintiff, without the leave of [*319] the judge, unless seven days at least before the trial he furnishes particulars to the plaintiff of the matters as to which he intends to give evidence. (Order XXXVI. r. 37.)

The previous libels and slanders may be made the matter of a counter-claim, even though not immediately connected with the words on which plaintiff is suing; and the defendant may thus not only reduce the amount of damages due to the plaintiff, but even overtop the plaintiff's claim, and recover judgment for the balance. (*Quin* v. *Hession*, 40 L. T. 70; 4 L. R. Ir. 35.) And where there is no counter-claim, the previous conduct of the plaintiff may be ground for applying to the judge to deprive him of costs. In *Harnett* v. *Vise and wife*, 5 Ex. D. 307; 29 W. R. 7, Huddleston, B., deprived a plaintiff of his costs on this ground, although the jury found that the plea of justification was not proved, and had given him damages £10. And this decision of the learned baron was upheld both in the Exchequer Division and in the Court of Appeal.

A libel by A. on B. is no justification for an assault by B. on A., though if A. sue for the assault, B. may give the libel in evidence to show provocation, and thus reduce the damages. (*Fraser* v.

Berkeley, 7 C. & P. 621 ; 2 M. & R. 3 ; *Keiser* v. *Smith*, 46 Amer. Rep. 342.)

Illustrations.

The defendant published an inaccurate report of proceedings in a court of justice, reflecting on the character of the plaintiff ; any evidence to show that the defendant honestly intended to present a fair account of what took place, and had blundered through inadvertence solely, was held admissible by Coleridge, J., in

Smith v. *Scott*, 2 Car. & Kir. 580.

And, therefore, evidence of what really did take place at the trial is admissible ; though no evidence can be given of the truth or falsehood of the statements there made.

East v. *Chapman*, M. & M. 46 ; 2 C. & P. 570.

Vessey v. *Pike*, 3 C. & P. 512.

Charlton v. *Watton*, 6 C. & P. 385.

Where a newspaper republished the report of a company containing reflections on the plaintiff, their manager, Wightman, J., directed the jury that if they were satisfied such publication was made innocently, and with no desire to injure the plaintiff, they might give nominal damages only.

Davis v. *Cutbush and others*, 1 F. & F. 487.

Where an editor refused to disclose the name of his correspondent who wrote the libel, but offered to open his columns to the plaintiff, and the plaintiff accepted this offer and wrote several letters which defendants published, replying to the charges made against him and explaining them away, Martin, B., directed the jury to take these circumstances into their consideration in favor of the defendants.

Harle v. *Catherall and others*, 14 L. T. 801.

[* 320] (v.) *Evidence of the plaintiff's bad character.*

One way, but a very dangerous one, of minimising the damages, is to show that the plaintiff's previous character was so notoriously bad that it could not be impaired by any fresh accusation, even though undeserved. The gist of the action is the injury done to the plaintiff's reputation ; and if the plaintiff had no reputation to be injured, surely he cannot be entitled to more than nominal damages. Hence the fact that plaintiff had a general bad character before the date of the libel or slander may be given in evidence in mitigation of damages. But the defendant may not go into particular instances ; still less may he prove the existence of a general report that the plaintiff had actually committed the particular offence of which the defendant accused him or any similar offence.

If, however, the plaintiff goes into the box, he can of course be cross-examined "to credit" on all the details of his previous life which affect his credit ; but, unless such details are material to the issue, the defendant must take the plaintiff's answer, and cannot call evidence to contradict it.

Evidence as to plaintiff's general bad character will not, however, be admissible unless it be shown that his character was such previously to the alleged slander or libel ; for otherwise his evil reputation may have been occasioned by the defendant's own publication, which would rather aggravate than diminish the damages. (*Thompson* v. *Nye*, 16 Q. B. 175 ; 20 L. J. Q. B. 85 ; 15 Jur. 285.) And now by Order XXXVI. r. 37, a defendant who has not justified will not be entitled on the trial to give evidence in chief, with a view to

mitigation of damages, as to the character of the plaintiff, without the leave of the judge, unless seven days at least before the trial he furnishes particulars [*321] to the plaintiff of the matters as to which he intends to give evidence.

There has been a great conflict of opinion as to the admissibility of evidence of the plaintiff's general bad character, and of rumours prejudicial to his reputation; but the law on the point has now been finally settled by the decision in *Scott* v. *Sampson*, *supra*. It is, therefore, no longer necessary to refer in detail to the numerous scantily reported and conflicting rulings on the point at Nisi Prius, which are dealt with in that exhaustive judgment. The following cases, which are not referred to, bear out the decision: *Woolmer* v. *Latimer*, 1 Jur. 119; *Mills and wife* v. *Spencer and wife*, Holt, N. P. 533; *Rodriguez* v. *Tadmire*, 2 Esp. 721. The Irish case *Bell* v. *Parke*, 11 Ir. C. L. R. 414, is consistent with *Scott* v. *Sampson*, except in one point: the Irish judges admitted evidence that the plaintiff had certain vicious habits which would lead him to commit such acts as that ascribed to him in the slander. This ruling will not be followed in England.

But the decision in *Scott* v. *Sampson* does not appear to restrict in any way the defendant's liberty (or licence) of cross-examination. Lord Coleridge did not exclude any question put by defendant's counsel to any witness called by the plaintiff. Hence I apprehend that *Wyatt* v. *Gore*, Holt, N. P. 299; and *Snowdon* v. *Smith*, 1 M. & S. 286, n., which were not cited in *Scott* v. *Sampson*, as well as *Newsam* v. *Carr*, 2 Stark. 69, which is referred to, are still good law. I do not think these are to be considered as overruled by *Bracegirdle* v. *Bailey*, 1 F. & F. 536, as in that case the plaintiff had given no evidence in chief, so that questions merely to credit were inadmissible, and, moreover, the question rejected tended to show that the libel was true, and no justification had been pleaded. (See *ante*, p. 312.) Order XXXVI. r. 37, is also confined to evidence tendered by the defendant in chief.

Illustrations.

In an action for words imputing adultery to a widow, Holroyd, J. held that it was competent to the defendant to go into general evidence to impeach the plaintiff's character for chastity.

Ellershaw v. *Robinson et ux.* (1824), 2 Starkie on Libel, 2nd ed. p. 90.

And Lord Tenterden is said to have admitted similar evidence, although a justification was pleaded.

Mawby v. *Barber* (1826), 2 Starkie on Evidence, p. 470.

And see *Maynard* v. *Beardsley*, 7 Wend. 560.

When such general evidence has been given, plaintiff's counsel may go into particular instances to rebut it.

Rodriguez v. *Tadmire*, 2 Esp. 721.

[*322] (vi) *Absence of Special Damage.*

When any special damage is alleged, the *onus* of proving it lies of course on the plaintiff. The defendant may call evidence to rebut

the plaintiff's proof, though he generally prefers to rely on the cross-examination of the plaintiff's witnesses. He may either dispute that the special damage has occurred at all, or he may argue as a matter of law that it is too remote (see *post*, p. 325) ; or he may call evidence to show that it was not the consequence of the defendant's words, but of some other cause. A plaintiff may not recover the same damages for the same injury twice from two different defendants ; but he may recover from two different defendants damages proportioned to the injury each has occasioned. (*Harrison* v. *Pearce*, 1 F. & F. 567 ; 32 L. T. (Old S.) 298 ; *Wyatt* v. *Gore*, Holt, N. P. 299, *ante*, p. 315.)

(vii.) *Apology and Amends.*

By Lord Campbell's Act (6 & 7 Vict. c.196), s. 1, it is enacted, "that in any action for defamation it shall be lawful for the defendant (after notice in writing of his intention so to do, duly given to the plaintiff at the time of filing or delivering the plea in such action) to give in evidence, in mitigation of damages, that he made or offered an apology to the plaintiff for such defamation before the commencement of the action, or as soon afterwards as he had an opportunity of doing so, in case the action shall have been commenced before there was on opportunity of making or offering such apology."

And by s. 2, "that in an action for a libel contained in any public newspaper or other periodical publication, it shall be competent to the defendant to plead that such [*323] libel was inserted in such newspaper or other periodical publication without actual malice, and without gross negligence, and that, before the commencement of the action, or at the earliest opportunity afterwards, he inserted in such newspaper or other periodical publication a full apology for the said libel, or if the newspaper or periodical publication in which the said libel appeared should be ordinarily published at intervals exceeding one week, had offered to publish the said apology in any newspaper or periodical publication to be selected by the plaintiff in such action ; and that to such plea to such action it shall be competent to the plaintiff to reply generally, denying the whole of such plea." (See *Chadwick* v. *Herapath*, 3 C. B. 885 ; 16 L. J. C. P. 104 ; 4 D. & L. 653.) Money must be paid into Court by way of amends at the time any plea under s. 2, is delivered, or it will be treated as a nullity (8 & 9 Vict. c. 75, s. 2). Hence no other defence denying liability can now be joined with such a plea. (Order XXII. r. 1 ; and see *O'Brien* v. *Clement*, 3 D. & L. 676 ; 15 M. & W. 435 ; 15 L. J. Ex. 285 ; 10 Jur. 395 ; and *Barry* v. *M'Grath*, Ir. R. 3 C. L. 576.)

There is a difference between the language of the two sections as to the date at which the apology must appear ; but they both mean the same thing. It will not be sufficient for the defendant under sect. 2 to plead that the apology was inserted "at the earliest opportunity after" the commencement of the action, if there was an opportunity before. (Per Keating, J., in *Ravenhill* v. *Upcott*, 33 J. P. 299 ; and see *Evening News* v. *Tryon*, 36 Amer. R. 450.)

There appears to be no English decision reported as to what is, and what is not, "gross negligence" in the conduct of a newspaper. But in America it has been decided that the jury may take into consideration the hurry necessarily incident to the preparation and publication of a daily newspaper, as where an article is brought in at the last moment before going to press (*Scripps* v. *Reilly*, 38 Mich. 10) ; but that the excitement of an election is no mitigation. (*Rearick* v. *Wilcox*, 81 Ill. 77.)

[*324] But wholly apart from these sections, a defendant may give evidence of any apology or other amends in mitigation of damages ; even though such apology was not made "at the earliest opportunity after the commencement of the action" (*Smith* v. *Harrison*, 1 F. & F. 565). Still a tardy or reluctant apology will not avail the defendant much. A retraction should be made as publicly as the charge, and as far as possible to the same persons ; and the defendant should do his utmost to stop the further sale of the libel. The sufficiency or insufficiency of an apology is peculiarly a question for the jury. (*Risk Allah Bey* v. *Johnstone*, 18 L. T. 620.) But a statement cannot be called an apology, unless it both unreservedly withdraws all imputation and expresses regret for having made it. The defendant must not try to exculpate himself or justify his conduct (see *post*, p. 524).

The apology should be full, though it need not be abject ; the defendant is not bound to insert an apology dictated by the plaintiff ; but it must be such as an impartial person would consider reasonably satisfactory under all the circumstances of the case. (*Risk Allah Bey* v. *Johnstone*, 18 L. T. 620.) It should be printed in type of ordinary size, and in a part of the paper where it will be seen ; not hidden away among the advertisements or notices to correspondents. (*Lafone* v. *Smith*, 3 H. & N. 735 ; 28 L. J. Ex. 33 ; 4 Jur. N. S. 1064.)

So, too, a defendant may now, with or without any apology, pay money into Court by way of satisfaction or amends, at any time between service of the writ and delivering his Defence, or by leave of a master at chambers at any later time. If such payment be made before delivering the Defence, he should at once give the plaintiff notice that he has paid in such money ; and in any case he should plead the fact of payment into Court in his Defence. But if such payment into Court be made, no other defence denying liability can be pleaded. (Order XXII. r. 1.)

[*325]

VI.—Remoteness of Damages.

The special damage alleged must be the natural and probable result of the defendant's wrongful conduct. In some cases it can be shown that the defendant contemplated and desired such result at the time of publication : in other cases the result is so clearly the natural and necessary consequence of the libel or slander that it may fairly be said the defendant ought to have contemplated it, whether in fact he did so or not. But where the damage sustained by the plaintiff is neither the necessary and reasonable result of the

defendant's conduct, nor such as can be shown to have been in the defendant's contemplation at the time, there the damage will be held too remote. Evidence cannot be given at the trial of any special damage which would not flow from defendant's words in the ordinary course of things, unless there are special circumstances in the case which show that the defendant intended and desired that result. It is not enough that his words have in fact produced such damage, unless it can reasonably be presumed that the defendant, when he uttered the words, either knew, or ought to have known, that such damage would ensue.

Illustrations.

The defendant insinuated that the plaintiff had been guilty of the murder of one Daniel Dolly; the plaintiff thereupon demanded that an inquest should be taken on Dolly's body, and incurred expense thereby. *Held* that such expense was recoverable as special damage; though it was not *compulsory* on the plaintiff to have an inquest held.

Peake v. *Oldham*, Cowp. 275; 2 W. Bl. 960.

"Suppose that during the war of 1870, an Englishman had been pointed out to a Parisian mob as a German spy, and thrown by them into the Seine, it could not be contended that one act was *not* the natural and necessary consequence of the other."

Mayne on Damages, 3rd ed. p 426; 4th ed. p. 454.

[* 326] The defendant said to Mr. Knight of his wife Mrs. Knight, "Jane is a notorious liar she was all but seduced by a Dr. C., of Roscommon, and I advise you, if C. comes to Dublin, not to permit him to enter your place. . . . She is an infamous wretch, and I am sorry that you had the misfortune to marry her, and if you had asked my advice on the subject I would have advised you not to marry her." Knight thereupon turned his wife out of the house and sent her home to her father, and refused to live with her any longer. *Held* that loss of *consortium* of the husband can constitute special damage; but that in this case the husband's conduct was not the natural or reasonable consequence of defendant's slander. *Secus*, had the words imputed actual adultery since the marriage.

Lynch v. *Knight and wife*, 9 H. L. C. 577; 8 Jur. N. S. 724.

Parkins et ux. v. *Scott et ux.*, 1 H. & C. 153; 31 L. J. Ex. 331; 8 Jur. N. S. 593; 10 W. R. 562; 6 L. T. 394; *post*, p. 329.

Where the libel attacked the character of both husband and wife and the declaration alleged that the wife fell ill and died in consequence of it, evidence of such damage was excluded in an action brought by the surviving husband.

Guy v. *Gregory*, 9 C. & P. 584.

A declaration alleged that the defendant falsely and maliciously spoke of the plaintiff, a working stonemason, "He was the ringleader of the nine hours' system," and "He has ruined the town by bringing about the nine hours' system," and "He has stopped several good jobs from being carried out, by being the ringleader of the system at Llanelly," whereby the plaintiff was prevented from obtaining employment in his trade at Llanelly. *Held*, on demurrer, that the alleged damage was not the natural or reasonable consequence of the speaking of such words, and that the action could not be sustained.

Miller v. *David*, L. R. 9 C. P. 118; 43 L. J. C. P. 84; 22 W. R. 332; 30 L. T. 58.

The special damage must be the direct result of the defendant's words. The jury may not take into their consideration any damage which is produced not so much by the defendant's words as by some other fact or circumstance unconnected with the defendant, such as the spontaneous resolution of a third person. The defend-

ant's words must at all events be the *predominating* cause of the damage assigned.

Illustrations.

The defendant slandered the plaintiff to his master B. Subsequently B. discovered from another source that the plaintiff's former master had dismissed him for misconduct. Thereupon B. discharged the plaintiff in the middle of the term [*327] for which he had engaged his services. *Held* that no action lay against the defendant; for his words alone had not caused B. to dismiss the plaintiff.

Vicars v. *Wilcox*, 8 East, 1; 2 Sm. L. C. 553 (8th ed.)

As explained in *Lynch* v. *Knight and wife*, 9 H. L. C. 590, 600.

Bingham caused a libel on plaintiff, the proprietor of a newspaper, to be printed by Hinchcliffe as a placard, and distributed 5,000 such placards. He also put the same libel into a rival newspaper, the defendant's, as an advertisement. Plaintiff sued both Bingham and Hinchcliffe as well as the defendant, alleging that the circulation of his paper had greatly declined. The action against the defendant came on first, and his counsel, having failed to prove the justification pleaded, contended that the decline of circulation must principally be ascribed to the 5,000 placards, not to the advertisement. Martin, B., while admitting that defendant was not liable for damage caused by the placards, ruled that it lay on defendant to prove that the damage sustained by the plaintiff was in fact due to the placard, and not to the advertisement. Verdict for the plaintiff, £500. In the action against Bingham and Hinchcliffe plaintiff recovered only 40*s*. The £500 was probably due to the justification pleaded and not proved.

Harrison v. *Pearce*, 1 F. & F. 567; 32 L. T. (Old S.) 298.

Wyatt v. *Gore*, Holt, N. P. 299, *ante*, p. 315.

The plaintiff alleged that certain persons would have recommended him to X., Y., and Z., had not the defendant spoken certain defamatory words of him on the Royal Exchange, and that X., Y., and Z. would, on the recommendation of those persons, have taken the plaintiff into their employment. The plaintiff claimed damages for the loss of the employment. Such damage was *held* too remote, for it was caused by the non-recommendation, not by the defendant's words.

Sterry v. *Foreman*, 2 C. & P. 592.

And see *Hoey* v. *Felton*, 11 C. B. N. S. 142; 31 L. J. C. P. 105.

In an action of slander of title to a patent, the plaintiff alleged as special damage that in consequence of defendant's opposition, the Solicitor-General refused to allow the letters-patent to be granted with an amended title, as the plaintiff desired. *Held* that this damage was too remote, being the act of the Solicitor-General and not of the defendant.

Haddon v. *Lott*, 15 C. B. 411; 24 L. J. C. P. 49.

Kerr v. *Sheddon*, 4 C. & P. 528.

Special damage alleged, that in consequence of defendant's words, Butler would not deliver some barley which plaintiff had bought of him, except for cash on delivery. Butler, being called, admitted in cross-examination that he should have insisted on cash on delivery anyhow, even if defendant had never said anything at all, and that that was his understanding of the contract between himself and the plaintiff. *Held* no special damage.

King v. *Watts*, 8 C. & P. 614.

The plaintiff was a candidate for membership of the Reform Club, but upon a ballot of the members was not elected. Subsequently a meeting of the members was called to consider an alteration of the rules regarding the election of members. Before the day fixed for the meeting the defendant spoke certain words concerning the plaintiff, which "induced or contributed to inducing a majority of the members of the club to retain the regulations under which the plaintiff [*328] had been rejected, and thereby prevented the plaintiff from again seeking to be elected to the club." *Held* that the damage alleged was not pecuniary or capable of being estimated in money, and was not the natural and probable consequence of the defendant's words.

Chamberlain v. *Boyd* (C. A.), 11 Q. B. D. 407; 52 L. J. C. Q. B. 277; 31 W. R. 572; 48 L. T. 328; 47 J. P. 372, *post*, p. 630.

The act of a third party, if directly caused by the defendant's language, is *not* too remote, provided the defendant either did contemplate or ought to have contemplated such a result. The defendant cannot be held liable for any eccentric or foolish conduct on the part of the person he addressed ; but only for the ordinary and reasonable consequences of his words. The fact that such act is in itself a ground of action by the plaintiff against such third party is immaterial.

Formerly this was much doubted. It was held in *Vicars* v. *Wilcox*, 8 East, 1 ; 2 Sm. L. C. 553 (8th edition), that where the plaintiff's master was induced by the slander to dismiss the plaintiff from his employ before the end of the term for which they had contracted, such dismissal was too remote to be special damage, because it was a mere wrongful act of the master, for which the plaintiff could sue him. The same doctrine was laid down in *Morris* v. *Langdale*, 2 B. & P. 284 ; and *Kelly* v. *Partington*, 5 B. & Ad. 645 ; 3 N. & M. 116. But this is clearly contrary to *Davis* v. *Gardiner*, 4 Rep. 16 ; *ante*, p. 299, and the numerous other cases in which loss of a marriage was held to constitute special damage, although the plaintiff there had an action for breach of promise of marriage. Doubts were thrown on *Vicars* v. *Wilcox* in *Knight* v. *Gibbs*, 1 A. & E. 43 ; 3 N. & M. 467 ; and in *Green* v. *Button*, 2 C. M. & R. 707 ; and it must now be taken to have been overruled by the *dicta* of the law lords in *Lynch* v. *Knight and wife*, 9 H. L. C. 577, and by the decision in *Lumley* v. *Gye*, 2 E. & B. 216 ; 22 L. J. Q. B. 463 ; 17 Jur. 827. And it is now, I think, clear law that defendant is liable for any illegal act which it was his obvious intention, or the natural result of his words, to induce another to commit. "To make the words actionable by reason of special damage, the consequence must be such as, taking human nature as it is with its infirmities, and having regard to the relationship of the parties concerned, might fairly and reason- [* 329] ably have been anticipated and feared would follow from the speaking of the words." (Per Lord Wensleydale in *Lynch* v. *Knight and wife*, 9 H. L. C. p. 600.) "If the experience of mankind must lead any one to expect the result, the defendant will be answerable for it." (Per Littledale, J., in *R.* v. *Moore*, 3 B. & Ad. 188. And see *Société Française des Asphaltes* v. *Farrell*, 1 Cababé & Ellis, 563 ; and *Carrol* v. *Falkiner*, Kerford & Box's Digest of Victoria Cases, 216.)

Illustrations.

A man may not recover the same damages for the same injury twice from two different defendants ; but he may recover from two different defendants damages proportioned to the injury each has occasioned, and clearly where words are spoken by a defendant *with the intent* to make a third person break his contract with the plaintiff, the fact that such person did break his contract with the plaintiff in consequence of what the defendant said, may be proved as special damage against that defendant.

Carrol v. *Falkiner*, Kerford & Box's Digest of Victoria Cases, 216.

If I tell a master falsely that his servant has robbed him and thereupon he instantly dismisses him, I must be taken to have contemplated this as a natural and probable consequence of my act. But if the master horsewhips his servant

instead of dismissing him, this is not the natural result of my accusation; I could not be held liable for the assault as special damage. See per Williams, J., in

Haddon v. *Lott*, 15 C. B. 411; 24 L. J. C. P. 50.

Mrs. Scott charged Mrs. Parkins with adultery. She indignantly told her husband, and he was unreasonable enough to insist upon a separation in consequence. *Held*, that no action lay.

Parkins et ux. v. *Scott et ux.*, 1 H. & C. 153; 31 L. J. Ex. 331; 8 Jur. N. S. 593; 10 W. R. 562; 6 L. T. 394; 2 F. & F. 799.

Lynch v. *Knight and wife*, 9 H. L. C. 577; 5 L. T. 291, *ante*, p. 326.

The plaintiff engaged Mdlle. Mara to sing at his concerts; the defendant libelled Mdlle. Mara, who consequently refused to sing lest she should be hissed and ill-treated; the result was that the concerts were more thinly attended than they otherwise would have been, whereby the plaintiff lost money. *Held* that the damage to the plaintiff was too remote a consequence of defendant's words to sustain an action by the plaintiff. It was, in short, not so much the result of defendant's words as of Mdlle. Mara's timidity or caprice.

Ashley v. *Harrison*, 1 Esp. 48; Peake, 256.

The defendant is not answerable "if, in consequence of his words, other persons had afterwards assembled and seized the plaintiff and thrown him into a horse-pond by way of punishment for his supposed transgression."

Per Lord Ellenborough, C. J., in *Vicars* v. *Wilcocks*, 8 East, 3.

It is not essential that the third person, whose act constitutes the special damage, should believe the words [* 330] spoken by the defendant, if it is shown that the words spoken did directly induce the act. The law is otherwise in America.

Illustrations.

The plaintiff and another young woman worked for Mrs. Enoch, a straw bonnet-maker, and lived in her house. The defendant, Mrs. Enoch's landlord, who lived two doors off, came to Mrs. Enoch and complained that the plaintiff and her fellow-lodger had made a great noise and been guilty of openly outrageous conduct, adding, "No moral person would like to have such people in his house." Mrs. Enoch thereupon turned them out of her house, and dismissed them from her employ, not because she believed the charge made, but because she was afraid it would offend her landlord if they remained. *Held* that the special damage was the direct consequence of the defendant's words.

Knight v. *Gibbs*, 1 A. & E. 43; 3 N. & M. 467.

And see *Gillett* v. *Bullivant*, 7 L. T. (Old S.) 490; *post*, p. 333.

But where the plaintiff was under twenty-one and lived at home with her father, and the defendant foully slandered her to her father, in consequence of which he refused to give her a silk dress and a course of music lessons on the piano which he had promised her, although he entirely disbelieved the defendant's story, this was *held* in America *not* to be such special damage as will sustain the action, on the ground that such treatment by a parent of his child is not the natural result of a falsehood told him against her. Per Grover, J.: "I do not think special damage can be predicated upon the act of any one who wholly disbelieves the truth of the story. It is inducing acts injurious to the plaintiff, caused by a belief of the truth of the charge made by the defendant, that constitutes the damage which the law redresses."

Anon., 60 N. Y. 262.

And see *Wilson* v. *Goit*, 17 N. Y. 445.

The special damage must be the direct result of the defendant's words, not of some one else's. If A. chooses of his own accord to republish the defendant's words, this is A.'s own act, for the consequences of which he alone is liable.

But if a republication by A. be the natural or necessary consequence of the defendant's publication to A., or if the defendant intended or desired A. to repeat his words, the defendant is liable for all the consequences of A.'s republication, for he directly caused it. A republication by A. to B. is not, however, considered in England a necessary consequence of defendant's publication; unless the original [* 331] communication made to A. places A. under a legal or moral obligation to repeat the slander to B. And, indeed, if defendant knew the relation in which A. stood to B., he will be taken to have maliciously contemplated and desired this result when he spoke to A.

Thus, it may happen that a person who invents a lie, and maliciously sets it in circulation, may sometimes escape punishment altogether. For if I originate a slander against you of such a nature that the words are not actionable *per se*, the utterance of them is no ground of action, unless special damage follows. If I myself tell the story to your employer, who thereupon dismisses you, you have an action against me; but if I only tell it to your friends and relations, and no pecuniary damage ensues from my own communication of it to any one, then no action lies against me, although the story is sure to get round to your master sooner or later. The unfortunate man whose lips actually utter the slander to your master is the only person that can be made defendant; for it is his publication alone which is actionable as causing special damage.

This state of the law is denounced by Kelly, C. B., in *Riding* v. *Smith*, 1 Ex. D. 94; 45 L. J. Ex. 281; 24 W. R. 487; 34 L. T. 500. It might, perhaps, have been argued formerly, in analogy to the principle of *Scott* v. *Shepherd*, 1 Sm. L. Cases (8th edit.), 466; 2 Wm. Bl. 892; 3 Wils. 403, that he who invented the slander and first set it in circulation, is as liable as he who "gave the mischievous faculty to the squib" and first started it on its wild career across the market-house at Milborne Port. But it will be remembered that the decision in that famous case turns expressly on the assumption that Willis and Ryal were *not* to be considered free agents, that what they did was "by necessity," was "the inevitable consequence of the defendant's unlawful act." Had they been considered as free agents voluntarily intervening, the other judges would have agreed with Blackstone, J. On principle, therefore, it is clearly good law to hold that when the repetition of the slander is spontaneous and unauthorized, when it is the voluntary act of a free agent, the originator of the slander is not answerable for any mischief caused by such repetition: and this principle is also far too strongly established by authority to be easily, if ever, shaken. It is as old as 1600. (*Holwood* v. *Hopkins*, Cro. Eliz. 787. And see *Ward* v. *Weeks*, 7 Bing. 211; 4 M. & P. 796; *Rutherford* v. *Evans*, 4 C. & P. 79; *Tunnicliffe* v. *Moss*, 3 C. & K. 83; *Parkins et ux.* v. *Scott et ux.*, 1 H. & C. 153; 31 L. J. Ex. 331; [* 332] 8 Jur. N. S. 593; *Dixon* v. *Smith*, 5 H. & N. 450; 29 L. J. Ex. 125; *Bateman* v. *Lyall*, 7 C. B. N. S. 638.) In *Riding* v. *Smith*, 1 Ex.

D. 94 ; 45 L. J. Ex. 281 ; 24 W. R. 487 ; 34 L. T. 500, it is true Kelly, C. B., expresses a "hope that the day will come when the principle of *Ward* v. *Weeks*, and that class of cases, shall be brought under the consideration of the Court of last resort ;" but Pollock and Huddleston, BB., upheld that decision. And in *Clarke* v. *Morgan*, 38 L. T. 354, Lindley, J., expressly states his opinion that the decisions in *Ward* v. *Weeks* and *Parkins* v. *Scott* have been in no way overruled by *Riding* v. *Smith* and *Evans* v. *Harries*, 26 L. J. Ex. 31 ; 1 H. & N. 251.

It is only in cases where the words are not actionable *per se* that the rule as to the remoteness of damages inflicts this apparent hardship upon the plaintiff; for where the words are actionable *per se*, and in all cases of libel, the jury find the damages *generally*, and will be careful to punish the author of a pernicious falsehood with all due severity ; although, of course, the judge will still direct them not to take into their consideration any damage which ensued from a repetition by a stranger. (*Rutherford* v. *Evans*, 4 C. & P. 79 ; *Tunnicliffe* v. *Moss*, 3 C. & K. 83.)

The two exceptions set out on p. 167, *ante*, are only apparent exceptions to the general rule. For whenever the first publisher either expressly or impliedly requests or procures the republication, he directly causes all damage that flows from the republication ; the second publisher is really his agent, for whose act he is liable. So, wherever the original publication to A. places A. under a legal or moral obligation to repeat the defendant's words, such repetition is clearly the natural consequence of defendant's communication to A.

In America the judges in one or two cases appear to carry this doctrine further, and seem to lay down the rule that wherever the repetition is *innocent* (that is, I presume, not malicious, and on a privileged occasion), the originator must be liable for all consequential damage caused by the repetition ; for else, it is said, the person injured would be without a remedy. He cannot sue the person repeating the slander, as the repetition is privileged ; therefore he *must* be able to sue the first publisher for the damage caused by his own publication, and by the innocent repetition as well. "Where slanderous words are repeated *innocently*, and without an intent to defame, as under some circumstances they may be, I do not see why the author of the slander should not be held liable for injuries resulting from it as thus repeated, as he would be if these injuries had arisen directly from the words as spoken by himself." (Per Beardsley, J., in *Keenholts* v. [* 333] *Becker*, 3 Denio, N. Y. 352 ; and see *Terwilliger* v. *Wands*, 17 N. Y. 58.) But it is strange to make the liability of one man depend on the absence of malice in another. Such, at all events, is not the law of England ; it by no means follows with us that because the repetition is privileged or innocent it is therefore the natural and necessary consequence of the prior publication. In *Parkins* v. *Scott* the repetition was clearly innocent, yet no action lay against the original defamer. Mrs. Parkins was in fact held to have no remedy. (See *Clark* v. *Chambers*, 3 Q. B. D. 327 ; 47 L. Q. B. 427 ;

26 W. R. 613 ; 38 L. T. 454 ; *Bassell* v. *Elmore*, 48 N. Y. 561, 567 ; *Titus* v. *Sumner*, 44 N. Y. 266.)

Illustrations.

Plaintiff "was in communication of marriage with J. S., who was seised in fee of land worth £200 per annum." Defendant spoke words to plaintiff's servant imputing unchastity to the plaintiff ; "and by reason of these words she lost her marriage." *Held* that no action lay, because the words were not spoken to J. S.

Holwood v. *Hopkins* (1600), Cro. Eliz. 787.

Weeks was speaking to Bryce of the plaintiff, and said, "He is a rogue and a swindler ; I know enough about him to hang him." Bryce repeated this to Bryer as Weeks' statement. Bryer consequently refused to trust the plaintiff. *Held* that the judge was right in nonsuiting the plaintiff : for the words were not actionable *per se*, and the damage was too remote.

Ward v. *Weeks*, 7 Bing. 211 ; 4 M. & P. 796.

A groom in a passion called a lady's-maid "a whore." A lady, hearing the groom had said so, refused to afford the lady's-maid her customary hospitality. *Held* that no action lay, for the groom had never spoken to the lady.

Clarke v. *Morgan*, 38 L. T. 354.

Dixon v. *Smith*, 5 H. & N. 450 ; 29 L. J. Ex. 125 ; *ante*, p. 305.

Defendant said of the plaintiff, a veterinary surgeon, in the White Lion public-house at Barnet, "He does not know his business." No one then in the public-house ceased to employ plaintiff in consequence ; but some others did, to whom the circumstance was reported. *Held* that defendant was not liable for the loss of their custom.

Hirst v. *Goodwin*, 3 F. & F. 257.

Rutherford v. *Evans*, 4 C. & P. 74.

Tunnicliffe v. *Moss*, 3 C. & K. 83.

The plaintiff was governess to Mr. L.'s children; the defendant told her father that she had had a child by Mr. L. : the father went straight to Mr. L. and told him what defendant had said. Mr. L. thereupon said that the plaintiff had better not return to her duties, for although he knew that the charge was perfectly false, still for her to continue to attend to his children, would be injurious to her character and unpleasant to them both. *Held* that the repetition by the [*334] father to Mr. L., and his dismissal of the plaintiff, were both the natural consequences of the defendant's publication to the father.

Gillett v. *Bullivant*, 7 L. T. (Old S.) 490.

Fowles v. *Bowen*, 3 Tiff. (30 N. Y.) 20.

H. told Mr. Watkins that the plaintiff, his wife's dressmaker, was a woman of immoral character. Mr. Watkins naturally informed his wife of this charge, and she ceased to employ the plaintiff. *Held* that the plaintiff's loss of Mrs. Watkins' custom was the natural and necessary consequence of the defendant's communication to Mr. Watkins.

Derry v. *Handley*, 16 L. T. 263.

A police magistrate dismissed a trumped-up charge brought by the plaintiff, a policeman, and added : "I am bound so say, in reference to this charge and a similar one brought from the same spot a few days ago, that I cannot believe William Kendillen on his oath." This observation was duly reported to the Commissioners of Police, who in consequence dismissed the plaintiff from the force. Lord Denman held that the dismissal was special damage for which the defendant would have been liable, if the action had lain at all : for he must have known that such a remark would certainly be reported to the commissioners, and would most probably cause them to dismiss the plaintiff. Nonsuit on the ground of privilege.

Kendillon v. *Maltby*, 1 Car. & Marsh. 402.

The defendant, a passenger on board a steam-packet, complained to the captain that the plaintiff, the third officer, had been guilty of misconduct towards one of the lady passengers. On the arrival of the vessel at Jamaica, the captain reported this charge to the marine superintendent of the company there, who reported it to the directors at the chief office of the company in London, who

dismissed the plaintiff from the service of the company. The plaintiff sought leave to issue a writ to be served on the defendant, who resided in Jamaica. None of the above cases were cited to the Court. Leave was refused, on the ground that the case did not come within the words of the repealed rule, Order XI. r. 1; but Bramwell, L. J., intimated that in his opinion the alleged special damage was too remote, differing from Denman, J., in the Court below.

Bree v. *Marescaux* (C. A.), 7 Q. B. D. 434; 50 L. J. Q. B. 676; 29 W. R. 858; 44 L. T. 644, 765.

If I make an oral statement to the reporter of a newspaper, intending and desiring him to insert the substance of it in the paper, I am liable for all the consequences of its appearing in print, although I never expressly requested the reporter to publish it.

Bond v. *Douglas*, 7 C. & P. 626.
R. v. *Lovett*, 9 C. & P. 462.
Adams v. *Kelly*, Ry. & Moo. 157.
R. v. *Cooper*, 8 Q. B. 533; 15 L. J. Q. B. 206.

But if I write you a private letter containing a libel on A., and you make a copy of it which you send to a newspaper to be published to all the world, without my leave, and in a way which I could not have anticipated, then this republication is your own unlawful act, for the consequences of which you alone are liable. I must pay damages only for the publication to you.

Per Best, C. J., 5 Bing. 402, 405.

[*325] The damage must of course have accrued to the plaintiff, and not to some one else. A loss which has resulted to A. in consequence of the defendant's having defamed B., is too remote to constitute special damage in any action brought by B. Whether A., who has himself suffered the damage, can sue, depends upon the closeness of the relationship between A. and B. If A. is B's master, A may perhaps have an action on the case *per quod servitium amisit*. If A. is B.'s husband, then it is clear law that the husband may sue for any special damage which has accrued to him through the defamation of his wife, (*post*, p. 395). But a wife cannot recover for any special damage which words spoken of her have inflicted on her husband. (*Harwood et ux.* v. *Hardwick et ux.* (1668), 2 Keble, 387.)

This rule presses very harshly upon married women; for before the Married Women's Property Act there was hardly any special damage which they could suffer. Their earnings were their husbands'; so was their time. Lord Wensleydale, in *Lynch* v. *Knight and wife*, 9 H. L. C. 597, even doubted if loss of *consortium* of her husband was such special damage as would sustain an action of slander by a wife. Loss of the society of her friends and neighbours clearly is not. The only special damage, in fact, which a married woman living with her husband could set up was loss of hospitality. And, even in conceding her this, the judges seemed to be straining the law, for her husband was bound to maintain her: so that such gratuitous entertainment was really a saving to the husband's pocket. But in *Davies* v. *Solomon*, L. R. 7 Q. B. 112; 41 L. J. Q. B. 10; 20 W. R. 167; 25 L. T. 799, the judges declined to scrutinize too nicely into such matters; and no doubt the loss is really the wife's. Her friends would supply her with better and other food than that which the law compels her husband to afford her. The operation of the Married Women's Property Acts may lessen the hardship. In some cases the difficulty might perhaps

have been obviated had the husband sued alone. (See *Coleman et ux* v. *Harcourt*, 1 Lev. 140 ; *post*, p. 399.)

Illustrations.

A brother cannot sue for slander of his sister.

Subbaiyar v. *Kristnaiyar and another*, I. L. R., 1 Madras, 383.

Nor a son for slander of his deceased father.

Luckumsey Rorji v. *Hurbun Nursey and others*, I L. R., 5 Bom. 580.

[*336] If one partner be libelled, he cannot recover for any special damage which has occurred to the firm.

Solomon and others v. *Medex*, 1 Stark. 191.

Robinson v. *Marchant*, 7 Q. B. 918 ; 15 L. J. Q. B. 134 ; 10 Jur. 156.

Similarly, if the firm be libelled as a body, they cannot jointly recover for any private injury to a single partner ; though that partner may now recover his individual damages in the same action.

Haythorn v. *Lawson*, 3 C. & P. 196.

Le Fanu v. *Malcolmson*, 1 H. L. C. 637 ; 8 Ir. L. R. 418 ; 13 L. T. (O. S.) 61.

Where words actionable *per se* were spoken of a married woman, she was allowed to recover only 20*s*. damages ; all the special damage which she proved at the trial was held to have accrued to her husband, and not to her : he ought, therefore, to have sued for it in a separate action.

Dengate and wife v. *Gardiner*, 4 M. & W. 5 ; 2 Jur. 470.

Seville et ux. v. *Sweeny*, 4 B. & Ad. 514 ; 1 N. & M. 254.

And other cases *post*, p. 399.

A declaration by husband and wife alleged that the defendant falsely and maliciously spoke certain words of the wife, imputing incontinence to her, whereby she lost the society of her neighbours, and became ill and unable to attend to her necessary affairs and business, and her husband incurred expense in curing her, and lost the society and assistance of his wife in his domestic affairs. *Held* that the declaration disclosed no cause of action.

Allsop and wife v. *Allsop*, 5 H. & N. 534 ; 29 L. J. Ex. 315 ; 6 Jur. N. S. 433 ; 8 W. R. 449 ; 36 L. T. (Old S.) 290.

Approved in *Lynch* v. *Knight and wife*, 9 H. L. C. 577.

Where words were spoken imputing unchastity to a woman, and by reason thereof she was excluded from a private society and congregation of a sect of Calvinistic Methodists, of which she had been a member, and was prevented from obtaining a certificate, without which she could not become a member of any other society of the same nature ; *held* that such a result was not such special damage as would render the words actionable.

Roberts and wife v. *Roberts*, 5 B. & S. 384 ; 33 L. J. Q. B. 249 ; 12 W. R. 909 ; 10 L. T. 602 ; 10 Jur. N. S. 1027.

[N. B.—The excommunication case, *Barnabas* v. *Traunter*, 1 Vin. Abr. 396 ; *ante*, p. 301, was not cited to the court in this case.]

CHAPTER XI.

[* 337] INJUNCTIONS.

INJUNCTIONS granted in actions for defamation are of three kinds :—

I. Injunctions granted to restrain or prevent such libels as are, or if published will be, contempt of Court.

II. Injunctions granted after verdict, or at the final hearing.

III. Injunctions granted on an interlocutory application before or without any verdict.

I. *Injunctions to restrain or prevent Contempt of Court.*

A libel is a contempt of Court, which

(a) Scandalises the Court itself ;

(b) Abuses the parties to any action before the Court ;

(c) Prejudices mankind against either party before the case is heard.

Such libels the Court has a clear and undoubted jurisdiction to restrain. "Nothing is more incumbent upon courts of justice, than to preserve their proceedings from being misrepresented ; nor is there anything of more pernicious consequence, than to prejudice the minds of the public against persons concerned as parties in causes, before the cause is finally heard." (Per Lord Hardwicke, L. C., in [* 338] *Roach* v. *Garvan*, *Re Read and Huggonson*, 2 Atk. 469 ; 2 Dick. 794.) The Court, therefore, will grant an injunction to restrain the publication of any libels, the evident result of which would be to affect the administration of justice, whether the writer intended that result or no. (Per Lord Romilly, M. R., in *Daw* v. *Eley*, L. R. 7 Eq. 49 ; 38 L. J. Ch. 113.) Such an injunction must be applied for promptly ; and it will not be granted if the applicant has himself entered into a controversy on the matter in the public press. (*Ibid.*)

Illustrations.

While the evidence in a Chancery suit was being taken before the examiner, the plaintiff caused the following advertisement to be inserted in the *Times* :— "To the share and debenture holders of the West Hartlepool Harbour and Railway Company :—I have just published a reply to the proceedings of a meeting of the proprietors, held at West Hartlepool on the 28th June last, which may be had of King, Parliament Street, and all booksellers. B. Cole-

man, —— Street, London." The pamphlet was full of abuse of the chairman of the defendant company, and also gave a digest of plaintiff's evidence before the examiner, &c. Vice-Chancellor Wood granted an injunction to restrain the plaintiff, the solicitors, servants, agents, and workmen from publishing so much of the pamphlet (stating the objectionable passages), and from publishing or offering for sale, during the progress of this suit, any book or pamphlet containing statements of the proceedings in this suit; and also from making public any of such proceedings otherwise than in the due course of the prosecution of this suit until the hearing of this case, or until the further order of this Court.

Coleman v. *West Hartlepool Harbour and Rail. Co.*, 8 W. R. 734; 2 L. T. 766.

One of the defendants in an action, who was a Nonconformist minister, circulated a handbill through the town in the following words:—

"Chancery Suit.

"Congregational Church, Herne Bay.

"On Sunday morning, June 25th, the Rev. Thomas Blandford will preach a sermon with special reference to the trial in which the town is so deeply interested, and which is fixed for the 27th and following days.

"Divine service to commence at 11 o'clock."

About forty inhabitants of Herne Bay were to be examined as witnesses at the trial. Bacon, V.-C., on Saturday, the 24th, granted an injunction to restrain Blandford from preaching any sermon or delivering any address with special or other reference to the trial, and from issuing these handbills, or being in any way instrumental in the publication or distribution of these or any other like handbills or notices, and from otherwise prejudicing or interfering with the trial of the action or the persons to be examined as witnesses therein.

Mackett v. *Commissioners of Herne Bay*, 24 W. R. 845.

The defendant, on receiving a statement of claim charging him with fraud, [* 339] wrote an angry letter to the plaintiff, a clergyman, threatening to have a few thousand copies printed, with defendant's own remarks thereon, and copies of the defendant's letters, and distributed amongst all the clergy, "addressed from the Clergy List." Fry, J., granted an injunction to restrain the threatened publication, as being both a libel on the plaintiff as plaintiff, and also as tending to prejudice the fair trial of the action.

Kiteap v. *Sharp*, 52 L. J. Ch. 134; 31 W. R. 227; 48 L. T. 64.

The plaintiffs and the defendant were ship brokers; the plaintiffs delivered a statement of claim charging the defendant with unfair and improper conduct in his business, and before any defence was delivered circulated copies among the business connections of both parties. Malins, V. C., held that the plaintiffs had committed a contempt of Court, and must pay the costs of a motion to commit them; he also granted an injunction to restrain the plaintiffs from publishing or circulating copies of the statement of claim in the action.

Bowden and another v. *Russell*, 46 L. J. Ch. 414; 36 L. T. 177.

Closely akin to the power of restraining contempts of Court, is the power which all superior Courts undoubtedly possess of forbidding for a time reports of or comments on their own proceedings, whenever the presiding judge considers that such publication will prejudice future proceedings.

Illustrations.

On the trial of Thistlewood and others for treason, in 1820, Abbott, C. J., announced in open Court that he prohibited the publication of any of the proceedings until the trial of all the prisoners should be concluded. In spite of this prohibition, the *Observer* published a report of the trial of the first two prisoners tried. The proprietor of the *Observer* was summoned for the contempt, and, failing to appear, was fined 500*l*.

R. v. *Clement*, 4 B. & Ald. 218.

Where one of two prisoners charged with murder confessed before his trial, and by his confession seriously implicated the other, the Court of Sessions pro-

hibited the *Edinburgh Evening Courant* from publishing the confession, lest it should prejudice the fair trial of the other prisoner.

Bell's Notes, 165.

See also *Emond's Case* (Dec. 7th, 1829), Shaw, 229.

Fleming and others v. *Newton*, 1 H. L. C. 363 ; 6 Bell's App. 175.

Riddell v. *Clydesdale Horse Society*, 12 Court of Session Cases (4th Series), 976.

Where several prisoners were to be tried at one sessions for similar acts of sedition, and on the trial of the first one the jury disagreed, and the *Dublin Evening Post* severely attacked the jury for not convicting him, the Dublin Assize Court made an order prohibiting all comments in any newspaper upon the proceedings of the session till all the prisoners had been tried, considering [*340] that such comments were calculated to excite feelings of hostility towards the prisoners about to be tried.

R. v. *O'Dogherty*, 5 Cox, C. C. 348.

The House of Lords, when sitting as a Court of Law, claimed for many years the right to appoint one printer to publish their proceedings, and to order that no other person should presume to publish the same, even after the case was at an end. So, in the case of an impeachment, Lord Erskine, L. C., held, after great hesitation, that such an order must be enforced by injunction; thus apparently admitting that one chamber of the legislature had the power to create a monopoly. Such a decision would not be upheld in the present day.

Gurney v. *Longman* (1807), 13 Vesey, 493–509.

And see *Millar* v. *Taylor* (1769), 4 Burr. 2303–2417.

Manby v. *Owen* (1755), 4 Burr. 2329, 2404.

Roper v. *Streater*, Skin. 234 ; 1 Mod. 217.

The Stationers v. *Patentees of Rolle's Abridgment*, Carter, 89.

Butterworth v. *Robinson*, 5 Ves. 709.

II. *Injunctions granted after Verdict or at the final Hearing.*

The Superior Courts have also unquestionable power to grant an injunction to restrain any further publication of what a jury has found to be an actionable libel or slander. After such a finding in his favour, the plaintiff may clearly ask for an injunction for his protection in the future in addition to damages for the injury done him in the past. Libel or no libel, malice or no malice, are pre-eminently questions for a jury, but after they have once been decided the judge may grant an injunction, if he is of opinion that any repetition of the libel would be injurious to the plaintiff's property. (*Saxby* v. *Easterbrook*, 3 C. P. D. 339 ; 27 W. R. 188.) So when an action is commenced in the Chancery Division (as it now may be), and the defendant does not demand a jury, or applies for one too late, the judge who tries the action may, at the hearing, grant an injunction. (*Thorley's Cattle Food Co.* v. *Massam*, 6 Ch. D. 582 ; 46 L. J. Ch. 713 ; 14 Ch. D. 763 ; 28 W. R. 295 ; 41 L. T. 542 ; (C. A.) 14 Ch. D. 781 ; 28 W. R. 966 ; 42 L. T. 851 ; *Thomas* v. *Williams*, 14 Ch. D. 864 ; 49 L. J. Ch. 605 ; 28 W. R. 983; 43 L. T. 91. See also the remarks of Lord [*341] Langdale, M. R., in *Clark* v. *Freeman*, 11 Beav. 117, 118; and of the late Master of the Rolls in *Hinrichs* v. *Berndes*, Weekly Notes for 1878, p. 11.)

Illustrations.

The plaintiff and the defendant were rival railway signal manufacturers. They both invented practically the same improvement; but defendant was the first to patent it. Plaintiff subsequently petitioned for a patent, but was refused as being too late. Thereupon the defendant published an advertisement announcing that "Saxby's application was cancelled by the Crown on the ground of piracy from Easterbrook." Plaintiff claimed damages £1,000, and an injunction to restrain the defendant from publishing libels against the plaintiff of the like nature and description. The jury awarded forty shillings, and Lord Coleridge, C. J., granted a perpetual injunction. The Divisional Court decided that he had power so to do, as the jury had previously found the matter libellous. [N.B.—This is the only reported case in which any injunction has been granted in the Queen's Bench Division in an action of libel or slander.]

Saxby v. *Easterbrook*, 3 C. P. D. 339; 27 W. R. 188.

Joseph and Josiah Thorley had equal rights to manufacture "Thorley's Food for Cattle," both possessed the secret of its composition, and manufactured the same article. Yet the executors of Joseph advertised that they "alone possessed the secret for compounding that famous condiment," which they knew to be false. Malins, V.-C., refused to grant an injunction on an interlocutory application; but granted it at the final hearing, and his decision was upheld by the Court of Appeal.

Thorley's Cattle Food Co. v. *Massam* (interlocutory), 6 Ch. D 582; 46 L. J. Ch. 713.

(Before Malins, V.-C.)14 Ch. D. 763; 28 W. R. 295; 41 L. T. 542.

(C. A.) 14 Ch. D. 781; 28 W. R. 966; 42 L. T. 851.

And see *James* v. *James*, L. R. 13 Eq. 421; 41 L. J. Ch. 253; 26 L. T. 568.

Mr. Gandy owned two patents for manufacturing cotton belting; plaintiffs were formerly his agents. An injunction was granted by Pearson, J., in 1883, to restrain the plaintiffs from selling the belting of other manufacturers as that of Gandy. Subsequently Gandy inserted an advertisement in the *British Trade Journal*, complaining that unprincipled persons were imitating his belting, and misleading the public, stating that the above injunction had been granted, and that he had reason to believe that plaintiffs still continued to sell a large quantity of other belting as his. North, J., granted an injunction with costs against both Gandy and the publisher of the *British Trade Journal*, and also ordered Gandy to pay £500 damages.

Kerr v. *Gandy*, 3 Times L. R. 75.

Where the plaintiff in a trade-mark case failed on all points but one, and afterwards published a "caution" to the trade, which stated the effect of the judgment so far as it was in his favour, but omitted all allusion to the parts of the judgment in defendant's favour, North, J., held the report unfair, gave [*342] the plaintiff £5 damages, and granted an injunction restraining its circulation, with costs.

Hayward & Co. v. *Hayward & Sons*, 34 Ch. D. 198; 56 L. J. Ch. 287; 35 W. R, 392; 55 L. T. 729.

III. *Injunctions granted on an Interlocutory Application before or without any Verdict.*

It has now been decided in the Chancery Division (in the face of a long series of decisions to the contrary), that the Court has jurisdiction to grant an injunction to restrain the publication of a libel upon an interlocutory application at any stage of the action. (*Quartz Hill Gold Mining Co.* v. *Beall* (C. A.), 20 Ch. D. 501; 51 L. J. Ch. 874; 30 W. R. 583; 46 L. T. 746.) And also to

restrain any slander calculated to injure the plaintiff's business. (*Hermann Loog* v. *Bean* (C. A.), 26 Ch. D. 306 ; 53 L. J. Ch. 1128 ; 32 W. R. 994 ; 51 L. T. 442 ; 48 J. P. 708.) No such injunction has as yet been granted in the Queen's Bench Division, so far as I am aware.

But this jurisdiction must be exercised with great caution so far as interlocutory applications are concerned, and especially in cases of slander. Thus, an interlocutory injunction will not be granted restraining any publication that is *primâ facie* privileged (*Quartz Hill Gold Mining Co.* v. *Beall* (C. A.), 20 Ch. D. 501 ; 51 L. J. Ch. 874 ; 30 W. R. 583 ; 46 L. T. 746), or that may be *bonâ fide* comment on a matter clearly of public interest. (*Armstrong and Others* v. *Armit and Others*, 2 Times L. R. 887.) Nor will an injunction be granted until it is proved that the matters alleged in the document complained of are untrue, so that the further issuing of such documents would not be *bonâ fide*. (*Halsey* v. *Brotherhood* (C. A.), 19 Ch. D. 386 ; 51 L. J. Ch. 233 ; 30 W. R. 279 ; 45 L. T. 640. See also [*343] *Anderson* v. *Liebig's Extract of Meat Co., Limited*, 45 L. T. 757.) Hence on this application, apparently, it lies on the plaintiff to prove that the defendant's statements are false. (*Burnett* v. *Tak*, 45 L. T. 743.) As soon as this is done an injunction will be granted against continuing them, as all future publications would then be *malâ fide*. (*Hill* v. *Hart Davies*, 21 Ch. D. 798 ; 51 L. J. Ch. 845 ; 31 W. R. 22 ; 47 L. T. 82 ; *Société Anonyme des Manufactures de Glaces* v. *Tilghman's Patent Sand Blast Co.* (C. A.), 25 Ch. D. 1 ; 53 L. J. Ch. 1 ; 32 W. R. 71 ; 49 L. T. 451 ; 48 J. P. 68.)

And although an interim or interlocutory injunction cannot as a rule be obtained unless the applicant shows clearly that "irreparable damage" will ensue from the continuance of the acts complained of —damage, that is, for which no amount of damages can adequately compensate him (*Mogul Steamship Co.* v. *M^c Gregor, Gow & Co.*, 15 Q. B. D. 476 ; 54 L. J. Q. B. 540 ; 53 L. T. 268 ; 49 J. P. 646)— yet in this special branch of equity injunctions appear to be freely granted without proof of any actual damage whenever the judge thinks the words are calculated to injure the plaintiff's business ; and this, even in the case of slander of title, where special damage is essential to the cause of action at common law. (*Thomas* v. *Williams*, 14 Ch. D. 864 ; 49 L. J. Ch. 605 ; 28 W. R. 983 ; 43 L. T. 91. But see *Dicks* v. *Brooks* (C. A.), 15 Ch. D. 22 ; 49 L. J. Ch. 812 ; 29 W. R. 87 ; 43 L. T. 71.)

Illustrations.

The Rev. Thomas Scott, at the time of his death, was employed in revising and improving the fourth edition of the Commentaries on the Bible, with the assistance of A. After his death, the plaintiff employed A. to finish this work, and then published it under the title of "The 5th Edition of Scott's Bible, with the Author's last Corrections and Improvements." In January, 1841, the defendants, Fisher & Co., began to publish, in monthly numbers, an illustrated edition of Scott's Bible, and a reprint of the fourth edition, the copyright in which had expired ; they advertised it, both in the public papers and on the wrappers of the numbers, as "a new and carefully revised edition of the work,"

and as intended to "contain the whole unadulterated labours of the author, not as [*344] re-edited by a different hand and an inferior mind, but precisely as the learned commentator bequeathed them to the world; the edition being printed from the last which the author published in the vigour of life." The bill prayed that the defendants might be restrained from selling or disposing of any more copies of their publication, having on the wrappers or covers thereof the advertisement or announcement before mentioned. But Lord Cottenham, L. C., held "that the advertisement complained of did not hold out to the public that the defendants' work contained any matter which was the exclusive property of the plaintiff; that although it further alleged that any additional or other matter which was contained in any edition subsequent to the fourth was spurious and of no value, that allegation, if untrue, was no subject for an injunction, although it might be the subject of an action, as being a libel on or disparagement of the plaintiff's edition."

Seeley v. *Fisher* (1841), 11 Sim. 581.

And see *Martin* v. *Wright* (1833), 6 Sim. 297.

There is in Scotland a public register of protests for non-acceptance and non-payment of bills of exchange and promissory notes, established by the Scotch Acts of 1681 and 1696, and the 12 Geo. III. c. 72, and 23 Geo. III. c. 18, to which everybody has a right of access. The defendants printed and published an accurate copy of this register for the benefit and information of merchants. A person whose name was upon the register applied to the Court of Session for an *interim* interdict to restrain such publication, so far as his own name was concerned. The Court granted the application, regarding it as an unauthorized publication of their own proceedings. But the House of Lords, on appeal, reversed the decree, holding that no such interdict ought to have been granted; Lord Cottenham expressing a strong opinion that such interdicts are an excess of the powers of the Court of Session; as by such intervention "jurisdiction over libels is taken from the jury, and the right of unrestricted publication is destroyed."

Fleming and others v. *Newton* (1848), 1 H. L. C. 363; 6 Bell's App. 175, *post*, p. 354; and see *Riddell* v. *Clydesdale Horse Society* (1885), 12 Ct. of Session Cases (4th series), 976.

But, in 1869, Malins, V.-C., granted both an interim and a final injunction to restrain one of the creditors of a bankrupt firm from advertising, for the information of all the other creditors, that the plaintiff was a partner in that firm, and was solvent.

Dixon v. *Holden*, L. R. 7 Eq. 488; 17 W. R. 482; 20 L. T. 357.

A motion was made on behalf of plaintiffs, the trustees of a permanent benefit building society and deposit bank, for an injunction to restrain the further publication and sale by the defendants of a book containing libellous comments on the plaintiffs' annual balance-sheets, and imputations on the solvency of the society; but Sir John Wickens, V.-C., refused the application, on the ground that he had no jurisdiction to grant such an injunction.

Mulkern v. *Ward*, L. R. 13 Eq. 619; 41 L. J. Ch. 464; 26 L. T. 831.

The plaintiffs, who were subscribers to an association called *The Underwriters' Registry*, and who had had a ship registered by the association in the highest class, moved to restrain the defendants, the committee of the association, from inserting in their published registry of ships the words "Class suspended" against the name of the plaintiffs' ship, the defendants having, by plaintiffs' permission, had a second survey of the ship, and altered their opinion as to its class. *Held*, that [*345] the defendants were justified in notifying to their subscribers and the public their honest opinion as to the merits of the ship, and had a right to suspend the class until the plaintiffs should have altered the ship according to their requirements. Injunction refused.

Clover and another v. *Royden*, L. R. 17 Eq. 190; 43 L. J. Ch. 665; 22 W. R. 254; 29 L. T. 639.

Hall, V.-C., refused to grant an injunction asked for by an insurance company to restrain the continued publication of a pamphlet which commented upon the statistical returns of various insurance companies, compared the expenses of their establishments with their liabilities, imputed to the plaintiff company insolvency and reckless extravagance in its management, and contained other

statements injurious to the plaintiff company in its trade and business. On appeal, his refusal was confirmed by Lord Cairns, L. C., and James and Mellish L.JJ., on the ground that the Court had no jurisdiction to grant such an injunction.

Prudential Assurance Co. v. *Knott*, L. R. 10 Ch. 142 ; 44 L. J. Ch. 192 ; 23 W. R. 249 ; 31 L. T. 866.

The prosecutors in a trade-mark case agreed not to press for a conviction if the plaintiff, the offender, would apologise. He thereupon gave them a letter of apology, with authority to make such use of it as they might think necessary and they accordingly offered no evidence, and he was acquitted. They published this letter as an advertisement, and continued to do so for nearly two months. Thereupon plaintiff moved to restrain any further publication, on the ground that the permission he had expressly given them to publish it was obtained by duress. *Held*, that there was no duress, that the compromise was a lawful one, and that the Court could not grant any injunction, even though the publication of the apology was injuring plaintiff's business.

Fisher v. *Apollinaris Co.* (C. A.), L. R. 10 Ch. 297; 44 L. J. Ch. 500; 23 W. R. 460; 32 L. T. 628.

The plaintiff, who was a vendor of cigars, moved to restrain the defendants, Berndes & Co,, from publishing in the *London Tobacco Trade Review* a circular which it was alleged they were about to publish in that journal, and which the plaintiff considered would injure his trade, and also to restrain the printer and publisher of the Review from inserting the advertisement. The Master of the Rolls ordered the motion to stand over till the hearing, and observed that he was not prepared to say that, if, under the Judicature Act, a plaintiff could sustain an action for libel, this Court would not at the hearing, while awarding damages for the libel, restrain the continuance of its publication.

Hinrichs v. *Berndes*, W. N. 1878, p. 11.

Where a circular was sent by one shareholder to his brother shareholders, containing statements as to the financial position of the company which were not positively proved to be untrue, and inviting all the shareholders to take some joint action with reference to the company, it was held that though the Court had jurisdiction to grant an interlocutory injunction restraining the publication, yet it would not do so when the circular was, as here, *primâ facie* a privileged communication.

Quartz Hill Gold Mining Co. v. *Beall* (C. A.), 20 Ch. D. 501 ; 51 L. J. Ch. 874 ; 30 W. R. 583 ; 46 L. T. 746.

A member of a friendly society issued to persons not members of the society [*346] circulars containing inaccurate statements as to the financial condition of the society. Kay, J., on motion, granted an injunction to restrain "the further issuing of this circular, or any other circular or letter containing false or inaccurate representations as to the credit or financial condition of the said society."

Hill v. *Hart Davies*, 21 Ch. D. 798 ; 51 L. J. C. H. 845 ; 31 W. R. 22.

The plaintiff dismissed one of his managers, the defendant, from his employ, who thereupon went about among the plaintiff's customers, making oral statements reflecting on the solvency of the plaintiff, and advised some of them not to pay the plaintiff for machines which had been supplied through himself. The plaintiff brought an action to restrain the defendant from making statements to the customers or any other person or persons that the plaintiff was about to stop payment, or was in difficulties or insolvent, and from in any manner slandering the plaintiff or injuring his reputation or business. No special damage was proved; but it was held both by Pearson, J., and the Court of Appeal, that the Court has jurisdiction to restrain a person from making slanderous statements calculated to injure the business of another person, and that this jurisdiction extends to oral as well as written statements, though it requires to be exercised with great caution as regards oral statements, and that in the present case an injunction ought to be granted.

Hermann Loog v. *Bean* (C. A.), 26 Ch. D. 306 ; 53 L. J. Ch. 1128 ; 32 W. R. 994 ; 51 L. T. 442 ; 48 J. P. 708.

The coopers of Cork and Limerick, who made butter-firkins by hand, were much annoyed at the plaintiff's starting a manufactory near Limerick for making similar firkins by machinery ; and they induced the butter merchants

of Limerick to print and widely distribute a "Notice to Farmers" stating that they would not purchase any butter packed in machine-made firkins, as they found them "to be most injurious to the keeping qualities of butter," to the great injury of plaintiff's business. The Irish Queen's Bench Division granted an injunction to restrain the publication of this notice, on the authority of *Hermann Loog* v. *Bean*, holding that the Judicature Act had altered the law as laid down in *Prudential Assurance Co.* v. *Knott*.

Punch v. *Boyd and others*, 16 L. R. Ir. 476.

The Briton Life Association, which was not a limited company, amalgamated twenty years ago with another company called the Medical and General Life Association, and the company thus formed took the name of the Briton Medical and General Life Association (Limited). In October, 1875, a new and distinct company, the plaintiff, was registered as the Briton Life Association (Limited). In 1885 a petition was presented for winding-up the Briton Medical and General Life Association (Limited), and in those proceedings a proposal was made for a reconstruction of the company and the reduction of its contracts. There was a reference to chambers to ascertain whether this scheme could be properly carried out with regard to the interests of the various persons concerned in the company. The defendant, who was a policy-holder in the Briton Medical and General Life Association (Limited), was alarmed at this proposal, and issued the following advertisement to his fellow policy-holders:—"Life Policy Dangers. Briton Life Office, which took over the Medical and General, is opposing the winding-up petition by a scheme which seeks to save shareholders' unpaid capital at expense of policy-holders. With a view to organized action, com- [*347] municate at once with Dr. Roberts, Vanburgh Castle, Blackheath, S. E." Kay, J., held, that persons reading this advertisement might understand it to refer to the plaintiff company (though that company never had anything to do with the Medical and General Association) and to impute insolvency to the plaintiff company; and he granted an injunction with costs. [It seems to me a harmless advertisement, not libellous, and to have been published honestly in reasonable self-defence.]

Briton Life Association (Limited) v. *Roberts*, 2 Times L. R. 319.

A newspaper article, commenting on recent alleged irregularities in the Ordnance Department of the War Office, whereby defective guns, &c, had been supplyed to the nation and accepted without sufficient trial, asserted that the plaintiff, a gun manufacturing company, had obtained contracts from government officials by corrupt means. The plaintiff brought an action for damages, and also applied for an injunction to restrain the editor and printer of the paper from further publishing libellous matter of the plaintiffs pending the action. The Court (Lord Coleridge, C. J., and Denman, J.), refused the application, as the subject-matter of the article was clearly one of great public interest, and the comments thereon were not proved to be *malâ fide*.

Armstrong and others v. *Armit and others*, 2 Times L. R. 887.

Restraining the Publication of Private Letters.

The unauthorized publication of copyright letters or other MSS., having value as literary property, will of course be restrained on the application of the writer or of one to whom he has assigned his copyright.

Pope v. *Curl*, 2 Atk. 342; *Thompson* v. *Stanhope*, Ambler, 737; *Forrester* v. *Waller*, cited 4 Burr. 2331; 2 Brown P. C. 129; 2 Swanst. 426, n.

A young man had received letters from an old lady, written under the influence of a weak attachment for him, which he threatened to publish. He agreed, however, not to publish the letters, but to return them on condition that he was paid a sum of money. This sum was paid him; yet he refused to give the letters up, and again threatened to publish them. An injunction was of course granted to restrain such a breach of contract and violation of good faith "with a purchaser, who, independent of any original copyright, had acquired the undoubted right of preventing that publication."

——— v. *Eaton* (1813), cited 2 Ves. & B. 23, 28.

Where an injunction had been obtained to restrain the publication by the

defendant of certain letters written by the plaintiff to Mitford, on the ground that Mitford had handed them to the defendant in breach of confidence, Sir Thomas Plumer, V.-C., dissolved it on proof that there had been no breach of faith or confidence, saying: "The plaintiffs have failed to establish either ground for the interference of a Court of Equity, copyright or confidence. If any case is to be made against the defendant, it cannot be upon these circumstances in a Court of Equity; the plaintiffs must therefore be left to do what they can at law; and this injunction must be dissolved."

Lord and Lady Perceval v. *Phipps*, 2 Ves. & B. 19, 29.

The defendant returned to the plaintiff the original letters he had received from the plaintiff, stating that he did not consider himself entitled to retain [*348] them. He subsequently advertised publicly that he was about to publish copies of these letters which he had taken before he returned the originals, without the knowledge of the plaintiff. Lord Eldon, after grave doubts as to his power so to do, ultimately granted an injunction to restrain the proposed publication, not on the ground that he had any power to prohibit libels—this he expressly disclaimed—but on the ground that the plaintiff had, under the circumstances, a right of property in the letters. The letters, indeed, do not appear to have been libellous.

Gee v. *Pritchard and another* (1818), 2 Swan. 402.

So it has been held in America that a Court of Equity has no jurisdiction to restrain or punish crime, or to enforce the performance of a moral duty, except in so far as it is connected with the rights of property. It cannot, therefore, restrain the publication of private letters which have no value as literary productions, although it may be evident that the publication is proposed with a view of wounding the feelings of others, or of gratifying a perverted public taste.

Hoyt v. *McKenzie*, 3 Barb. Ch. Cases (New York), 320.
Brandreth v. *Lance*, 8 Paige (New York Ch.), 24.
Wedmore v. *Scorel*, 3 Edw. Ch. R. 515.

But in a recent case, where an earl had separated from his wife, and after both were dead the executor of the earl published his "Life and Letters," and thereupon the defendant, the executrix of the countess, proposed to publish some of the earl's letters, which he had written to her and others in his lifetime, and of which the defendant was in possession as such executrix, Bacon, V.-C., though admitting that such letters were the defendant's property, yet granted an injunction forbidding her to publish or part with any of them, on the ground that he did not consider that their publication was necessary for the vindication of the character of the deceased countess. [Is not this reviving the censorship of the press?]

Earl of Lytton v. *Devey and Swan Sonnenschien & Co.*, 54 L. J. Ch. 293; 52 L. T. 121.

Rival Patentees.

A patent so long as it subsists, is *primâ facie* good; but a patentee is not entitled to issue circulars stating his intention to institute legal proceedings, in order to deter persons from purchasing alleged infringements of his patent, if he has no *bonâ fide* intention to follow up his threats by taking such proceedings, and the Court will in such case restrain him from any further issue of such circulars.

Rollins v. *Hinks*, L. R. 13 Eq. 355; 41 L. J. Ch. 358: 20 W. R. 287; 26 L. T. 56.
Axmann v. *Lund*, L. R. 18 Eq. 330: 43 L. J. Ch. 655; 22 W.R.789.
Watson v. *Trask*, 6 Ohio, 531.

The holder of a patent, the validity of which is not impeached, will not be restrained by injunction from issuing notices warning the public against purchasing certain articles, on the ground that they are infringements of his patent, and threatening legal proceedings against those who purchase them, until it is [*349] proved that his statements are untrue; but as soon as that is proved he will be restrained, as any further issue of them cannot be *bonâ fide*.

Halsey v. *Brotherhood*, (C. A.), 19 Ch. D. 386 ; 51 L. J. Ch. 233 ; 30 W. R. 279 ; 45 L. T. 640 ; affirming the decision of Jessel, M. R., 15 Ch. D. 514 ; 49 L. J. Ch. 786 ; 24 W. R. 9 ; 43 L. T. 366.

The plaintiffs moved for an injunction to restrain the defendants from publishing or circulating statements that the skates about to be introduced by the plaintiffs were an infringement of the defendants' patent. But the Vice-Chancellor (Chatterton) was of opinion that *Rollins* v. *Hinks* and *Axmann* v. *Lund* were virtually overruled by *The Prudential Insurance Co.* v. *Knott ;* and held that he had no jurisdiction to restrain a publication, whether libellous or not, merely because it may tend to injure property.

Hammersmith Skating Rink Co. v. *Dublin Skating Rink Co.*, 10 Ir. R. Eq. 235.

The defendant company had issued circulars, declaring that the plaintiff was wrongfully using the defendant's labels upon his jars of extract of meat, and threatening the plaintiff's customers with legal proceedings for buying and re-selling his jars bearing those labels ; the plaintiff applied for an injunction to restrain the defendant from issuing such circulars ; but the Court refused to grant it, because it was not satisfied that the statements complained of were untrue. (Chitty, J.)

Anderson v. *Liebig's Extract of Meat Co.*, 45 L. T. 757.

Subsequently Anderson issued new wrappers for his meat jars, with a photograph of Baron Liebig and the words, "This is the only Genuine Brand." The meat company, whose brand was at least as genuine as Anderson's, thereupon applied for and obtained an injunction restraining him from using such wrappers, although the company had themselves issued misleading advertisements. (Chitty, J.)

Liebig's Extract of Meat Co., Limited, v. *Anderson*, 55 L. T. 206.

An injunction under similar circumstances was granted *at the hearing* by Lord Romilly, M. R., in

James v. *James*, L R. 13 Eq. 421 ; 41 L. J. Ch. 253 ; 26 L. T. 568.

And see *Thorley's Cattle Food Co.* v. *Massam*, 6 Ch. D. 582 ; 46 L. J. Ch. 713.

But as to the necessity of an applicant for an injunction coming with clean hands, see

Leather Cloth Co., Limited, v. *American Leather Cloth Co., Limited*, 4 De Gex, Jones & Smith, 137 ; 33 L. J. Ch. 199.

Where defendant has issued notices to plaintiff's customers, asserting that plaintiff in selling certain goods is infringing defendant's patent rights, it is for the plaintiff to prove that the defendant's statements are false ; and if no *malâ fides* is proved, so that no damages could be recovered, the Court will not grant an injunction. If, however, in any judicial proceeding, the statements are proved to be false in fact, an injunction will be granted against continuing them, as all further publication would then be *malâ fide*. (Kay, J.)

Burnett v. *Tak*, 45 L. T. 743.

A motion was made for an injunction to restrain the defendant, the printer and publisher of the *Electrician* newspaper, from publishing or selling any copies of a particular issue of that paper, which contained a letter alleged to be a libel [* 350] on the plaintiff's patent in an electric lamp known as the Fyfe Main Lamp. The statements in the letter in question were said to be wholly untrue, and calculated to deter persons from making use of the plaintiff's patent. Day, J., sitting as vacation judge, granted an *interim* injunction.

Fyfe v. *Gray*, 73 Law Times (newspaper), 309.

The Court will not grant an injunction to restrain the *bonâ fide* issue of circulars, warning persons that if they buy of the plaintiff they will infringe the defendant's patent and be liable to proceedings, unless a very strong *primâ facie* case be made out showing that such publication is in violation of an express contract between the parties ; however much the balance of convenience may be in favour of granting it.

Société Anonyme des Manufactures de Glaces v. *Tilghman's Patent Sand Blast Co.* (C. A.), 25 Ch. D. 1 ; 53 L. J. Ch. 1 ; 32 W. R. 71; 49 L. T. 451.

The plaintiffs were the makers of "Rainbow Water Raisers or Elevators,"

and they commenced an action for an injunction to restrain the defendants from issuing a circular cautioning the public against the use of such elevators as being direct infringements of certain patents of the defendants. The plaintiffs subsequently gave notice of a motion to restrain the issue of this circular until the trial of the action. The defendants then commenced a cross action, claiming an injunction to restrain the plaintiffs from infringing their patents. *Held*, by Kay, J., that as there was no evidence of *malâ fides* on the part of the defendants, they ought not to be restrained from issuing the circular until their action had been disposed of, but that they must undertake to prosecute their action without delay.

Household and another v. *Fairburn and another*, 51 L. T. 498.

The law on this point has now been settled by express legislation :—" Where any person claiming to be the patentee of an invention, by circulars, advertisements, or otherwise, threatens any other person with any legal proceedings or liability in respect of any alleged manufacture, use, sale, or purchase of the invention, any person or persons aggrieved thereby may bring an action against him, and may obtain an injunction against the continuance of such threats, and may recover such damage (if any) as may have been sustained thereby, if the alleged manufacture, use, sale, or purchase to which the threats related was not in fact an infringement of any legal rights of the person making such threats : Provided that this section shall not apply if the person making such threats with due diligence commences and prosecutes an action for infringement of his patent."

46 & 47 Vict. c. 57, s. 32.

On any motion for an injunction under this section, the applicant must, as a condition precedent, show that there has been no infringement on his part. And if in opposition to the motion a case of alleged infringement is raised by the respondents' affidavits, an injunction will not be granted, although the respondents decline to take legal proceedings in respect of such alleged infringement.

Barney v. *United Telephone Co.*, 28 Ch. D. 394 ; 33 W. R. 576 ; 52 L. T. 573.

A threat by a private letter is within the section ; hence, where such a threat was made, but defendants now admit that plaintiffs have not infringed their [* 351] patents, they will be perpetually restrained from making or continuing threats of legal proceedings

Driffield and East Riding Cake Co. v. *Waterloo, &c, Cake Co.*, 31 Ch. D. 938 ; 55 L. J. Ch. 391 ; 34 W. R. 360 ; 54 L. T. 210.

On an application for an injunction under this section, it is not open to the plaintiff to dispute the validity of the defendant's patent. The issue must be confined to the question of infringement. (Chitty, J.)

Kurtz v. *Spence*, 33 Ch. D. 579 ; 55 L. J. Ch. 919 ; 35 W. R. 26 ; 55 L. T. 317.

It must be admitted that the law laid down in the above cases is new law ; and with all respect to the learned judges who decided them, it may be questioned whether it is good law. In the first edition of this book, published in February, 1881, the rule of law in force at that date was thus stated :—" No injunction can be obtained to prohibit the publication or republication on any libel, or to restrain its sale." (*Prudential Assurance Co.* v. *Knott*, L. R. 10 Ch. 142 ; 44 L. J. Ch. 192 ; 23 W. R. 249 ; 31 L. T. 866.). The matter must first go before a jury, who are to decide whether the words complained of are libellous or not. The Crown has no authority to restrain the press ; and the Courts, whether of law or of equity, cannot, till after verdict, issue any injunction in respect of any libels, save such as are contempts of court." (*Saxby* v. *Easterbrook*, 3 C. P. D. 339 ; 27 W. R. 188.) And I venture to think that this is

still the law of the land, and will be upheld as such in the House of Lords, if the question ever comes before that tribunal.

There has, no doubt, been a conflict of authority on this point. As long ago as 1742, it was clearly laid down in *Roach* v. *Garvan*, *Re Read and another*, 2 Atk. 469, that Courts of Equity had no jurisdiction over actions of libel and slander, whether public or private, except as contempts of their own Courts. The Courts of Common Law had at that time no power to grant injunctions at all. No doubt in the early days of arbitrary prerogative the Court of Star Chamber occasionally restrained the publication of works alleged to be seditious. But Scroggs, C. J., was impeached for attempting to introduce the practice into the King's Bench, in the Case of *Henry Carr*, 7 Howell's State Trials, 1111. See Article III. 8 Howell's State Trials, at p. 198.

It is, however, stated in the note to *Southey* v. *Sherwood*, 2 Mer. p. 441, that in 1720 in a case of *Burnett* v. *Chetwood*, Lord Chancellor Parker granted an injunction to restrain the printing and publishing of a translation into English of a book written in Latin, and which he thought had better remain in Latin ; "he looked upon it," he said, "that this Court had a superintendency [*352] over all books, and might in a summary way restrain the printing or publishing [of] any that contained reflections on religion or morality." The whole report is of very doubtful authority, being merely a note of the case which the reporter states he extracted from a manuscript volume of uncertain authorship, and which, he tells us, "may be considered as something curious," but it appears from the extract from the register book (p. 442) that the application was made by an executor in order to protect his copyright in a book written by his testator ; a copy having been surreptitiously obtained from the testator's publisher. The decree was founded on the statute 8 Anne, c. 19, which vested the property in the book, and the sole right of printing and publishing the same, in the executor of the author : hence, the above remark, if made, was quite unnecessary to the decision. An injunction will, of course, be granted to restrain any infringement of a copyright, or of a trade-mark ; or as in *Croft* v. *Day*, 7 Beav. 34, and *Lord Byron* v. *Johnston*, 2 Mer. 29, to prevent one man from fraudulently passing his own goods off as the goods of another to the prejudice of that other ; or, again, as in *Routh* v. *Webster*, 10 Beav. 561, to restrain an unauthorized use of the plaintiff's name calculated to deceive the public. But an injunction to restrain the publication of a libel or a slander stands on a very different footing from any of these cases.

Again, in 1810, in *Du Bost* v. *Beresford*, 2 Camp. 512, Lord Ellenborough, C. J., in deciding that a libellous picture could have no legal value as a work of art, said : "Upon an application to the Lord Chancellor, he would have granted an injunction against its exhibition, and the plaintiff was both civilly and criminally liable for having exhibited it." This remark, however, like that of Lord Chancellor Parker, was a mere *obiter dictum*, and is said to have greatly surprised all practitioners in the Courts of Equity. Mr. Howell was so informed "on very high authority ; and I had appre-

hended that this must have happened ; since, I believe, there is not to be found in the books any decision or any dictum posterior to the days of the Star Chamber, from which such doctrine can be deduced, either directly or by inference or analogy ; unless, indeed, we are to accept the proceeding of Lord Ellenborough's predecessor Scroggs and his associates in the case of *Henry Carr*." (20 Howell's State Trials, 799.)

Both remarks were expressly disavowed by Lord Campbell, L. C., in 1861, in the case of the *Emperor of Austria* v. *Day and Kossuth*, 3 De G. F. & J. 217, 239 ; 30 L. J. Ch. 690 ; 7 Jur. N. S. 639. "I have," he says, "no hesitation in saying that Lord Macclesfield was wrong when he laid down in *Burnett* v. [*353] *Chetwood*, 2 Mer. 441, that 'the Court of Chancery has a superintendency over all books, and might in a summary way restrain the printing or publishing any that contained reflections on religion or morality.' So I have no hesitation in saying that Lord Ellenborough was wrong when he laid down in *Dubost* v. *Beresford*, that 'the Lord Chancellor would grant an injunction against the exhibitition of a libellous picture.' For this language I have the high authority of Lord Eldon, who, in *Gee* v. *Pritchard*, 2 Swan. 414, upon the question of granting an injunction against the publication of a libel said, 'The publication of a libel is a crime, and I have no jurisdiction to prevent the commission of crimes.'"

So, in *Martin* v. *Wright* (1833), 6 Sim. 297, where the defendant had advertised his diorama as "Mr. Martin's Grand Picture of Belshazzar's Feast, painted with dioramic effect," and the plaintiff prayed for an injunction to restrain such misrepresentation, the Vice-Chancellor, Sir Launcelot Shadwell, said : "Then with respect to the defendant representing his copy as Martin's picture, it must be either better or worse ; if it is better, Martin has the benefit of it; if worse, then the misrepresentation is only a sort of libel, and this Court will not prevent the publication of a libel." (And see the remarks of Lord Cottenham, L. C., in *Seely* v. *Fisher* (1841), 11 Sim. 581, *ante*, p. 344.)

Again, in *Clark* v. *Freeman* (1848), 11 Beav. 112 ; 17 L. J. Ch. 142 ; 12 Jur. 149, Lord Langdale, M. R., laid it down most clearly that a Court of Equity would not interfere by injunction to prevent the publication of a libel. "Now if this Court," he said, "had jurisdiction in cases of the kind, you must first establish the offence at law. A judge sitting here cannot decide it. If, after that has been done, you find that an injury is thereby done to the plaintiff's property, or to his means of subsistence or of gaining a livelihood, I will not say that in such a case the Court might not interfere by injunction and prevent the repetition of similar actions. I cannot grant this injunction : I cannot liken this case to that of *Croft* v. *Day*, where a man fraudulently attempted to make his own goods pass off as the goods of another, to the prejudice of that other. This the Court would not allow. Its jurisdiction is well established ; but I am afraid that if I were to interfere as is now asked, I should be reviving the criminal jurisdiction of the Star Chamber. The case of the defendant is disgraceful ; but I think the granting

the injunction in this case would imply that the Court has jurisdiction to stay the publication of a libel, and I cannot think it has."

So, in *Fleming* v. *Newton* (1848), 1 H. L. C. 363, Lord Cotten-
[* 354] ham, L. C., was most distinctly of opinion that, whatever niceties might be shown to exist in Scotch law, such an interference with the liberty of the press was contrary to English law. After stating that it was not necessary for him to give any opinion upon the general question of the jurisdiction of the Scotch Courts in matters of interdict, because, assuming it to be as extensive as it was claimed to be, he thought that in the particular case it had clearly been improperly exercised, so that the general question was not necessarily involved in the appeal before the House, his Lordship continues: "I cannot, however, avoid expressing an earnest hope that, if this question should arise and require a decision in the Court of Session, and no distinct rule should be found already to exist upon the subject, the consequences of any rule to be established for the first time will be most carefully considered before such a rule is laid down; and particularly that it may be considered how the exercise of such a jurisdiction can be reconciled with the trial of matters of libel and defamation by juries under 55 Geo. III. c. 42, or, indeed, with the liberty of the press. That Act appoints a jury as the proper tribunal for trial of injuries to the person by libel or defamation; and the liberty of the press consists in the unrestricted right of publishing, subject to the responsibilities attached to the publication of libels, public or private. But if the publication is to be anticipated and prevented by the intervention of the Court of Session, the jurisdiction over libels is taken from the jury, and the right of unrestricted publication is destroyed. And I must add that, according to the doctrine attributed to the Lord Justice Clerk, in the printed report of his judgment, the exercise of this power would be quite arbitrary; for he considers that the right to claim damages, if the act had been committed, is not the test according to which the interdict must be granted or refused."

In this state of the authorities, Malins, V.-C., in *Springhead Spinning Co.* v. *Riley*, L. R. 6 Eq. 551; 37 L. J. Ch. 889; 16 W. R. 1138; 19 L. T. 64, and *Dixon* v. *Holden*, L. R. 7 Eq. 488; 17 W. R. 482; 20 L. T. 357, introduced an exception to the rule; for he decided that a Court of Equity had jurisdiction to restrain the publication of any document which tended to the destruction or deterioration of the plaintiff's property, or even of the plaintiff's professional reputation by which property is acquired. The decision in *Dixon* v. *Holden* professed to follow that of Lord Langdale, M.R., in *Routh* v. *Webster*, 10 Beav. 56, in which case an injunction was granted to restrain, not indeed a libel, for there was none, but an improper and unauthorized use by the defendants of the plaintiff's name as a trustee of the defendants' joint-stock company; whereas
[*355] in *Dixon* v. *Holden* the plaintiff sought to restrain the defendant from mentioning the plaintiff's name in an advertisement as a "solvent partner" in a bankrupt firm. And the decision was in no way limited to trade libels. "In the decision I arrive at," says his Honour, "I beg to be understood as laying down that this

Court has jurisdiction to prevent the publication of any letter, advertisement, or other document, which, if permitted to go on, would have the effect of destroying the property of another person, whether that consists of tangible or intangible property, whether it consists of money or reputation. Professional reputation is the means of acquiring wealth, and is the same as wealth itself."

In a subsequent case, in 1872, *Mulkern* v. *Ward*, L. R. 13 Eq. 619 ; 41 L. J. Ch. 464 ; 26 L. T. 831, Wickens, V.-C., commented very strongly on the decision in *Dixon* v. *Holden*, as introducing a "wholly new" rule, and one contrary to the previous decisions, which he therefore refused to follow. "Surely," he says, "if I granted the injunction, I should do more against the liberty of unlicensed printing, or, as it is commonly called, the liberty of the press, than has ever been done in any decided case, or than properly can be done in this country and in this century. At any rate, I am not prepared to do it, and therefore I refuse the motion." (L. R. 13 Eq. at p. 623. See also *Clover* v. *Royden*, L. R. 17 Eq. 190; 43 L. J. Ch. 665; 22 W. R. 254 ; 29 L. T. 639.)

In the next year, 1873, the same law was laid down with equal distinctness in two of the States of America in which English rules of equity prevail. In *The Singer Manufacturing Co.* v. *The Domestic Sewing Machine Co.*, 49 Georgia, 70 ; 15 Amer. Rep. 674, the Supreme Court of Georgia was prayed to grant an injunction to restrain the defendants from falsely advertising that they had won a prize offered for the best sewing machine, for which both plaintiffs and defendants had competed, and which had, in fact, been awarded to the plaintiffs. The judge below had refused to grant any such injunction, and on appeal the Supreme Court affirmed his decision. "There is no complaint that the defendant is doing or publishing anything to induce the public to believe that the machine he sells is the same as the complainant's. He is not taking defendant's property ; he is not infringing the plaintiff's right of property. He is denying—it may be falsely and injuriously denying—plaintiff's right to whatever credit the premium of the society gives. Will an injunction lie to prohibit such a wrong ? It is admitted there is no precedent for such an injunction in England or America. It is well settled that an injunction will not be granted to restrain [*356] slander or libel of title or of reputation. (6 Sim. 297 ; 11 Beav. 112 ; 11 Sim. 582.) Not that it is not a wrong ; not that the wrong may not be irreparable, but simply because Courts of Chancery, in the exercise of the extraordinary powers lodged in them, have uniformly refused to act in such a case, leaving parties to their remedy at law. The case made by the bill is one of words which are untrue in fact, and which are calculated to injure the credit of complainant's business and advance the business of defendant. Equity, it must be remembered, will not enjoin every wrong. There are injuries done by one man to another which no law will remedy. Telling lies, unless those lies be of a peculiar character, is one of such injuries. But there are very many wrongs—wrongs recognizable and capable of redress at law—that yet are not such wrongs as a Court of Equity will

enjoin. Libel and slander, however illegal and outrageous, will not be enjoined. This is the settled rule. (High on Injunctions, §693; same, §§23—28.) The most that can be said of the conduct of the defendant is that he is telling and publishing untruths—lies, if you will—calculated and intended to help himself and damage the complainant. To say that he may be enjoined from doing this, is to say that the writ of injunction may issue to restrain a libel or to stop slander. It is true the Courts of Equity constantly refuse to lay down any absolute limitation to its power to issue this writ. But this only means that cases coming within the principles on which the Court has long acted are not beyond its power, simply because the facts are novel or the injury peculiar. The principle is, that to authorize the writ there must be an irreparable expected injury to a property right. It is a perversion of language to say that the complainant has a property right in the *truth* of this report. For these reasons we do not think the complainant entitled to an injunction."

In November, 1873, in *Boston Diatite Co.* v. *Florence Manufacturing Co. and others*, 114 Mass. 69, the same point came before the Supreme Judicial Court of Massachusetts on a demurrer to a bill in equity, praying that the defendants might be restrained from representing that the goods manufactured by the plaintiffs were an infringement of patents owned by the defendants, and that the defendants were suing plaintiffs for such infringement. Gray, C. J. in delivering the judgment of the Court, which was based entirely upon the English cases cited above, said : "The jurisdiction of a Court of Chancery does not extend to cases of libel or slander, or of false representations as to the character or quality of the plaintiff's property, or as to his title thereto, which involve no breach of trust or of contract. . . . The opinions of Vice-Chancellor Malins, in *Springhead Spinning Co.* v. [*357] *Riley*, in *Dixon* v. *Holden*, and in *Rollins* v. *Hinks* appear to us to be so inconsistent with these authorities, and with well-settled principles, that it would be superfluous to consider whether upon the facts before him his decisions can be supported." Demurrer sustained and bill dismissed.

The same law had been laid down in earlier American cases, such as *Brandreth* v. *Lance* (1839), 8 Paige (New York Chy.), 24 ; and *Hoyt* v. *McKenzie* (1848), 3 Barb. Ch. Cases (New York), 320.

All doubts on the point, if there were any, were finally set at rest by the Court of Appeal in *Prudential Assurance Co.* v. *Knott*, L. R. 10 Ch. 142 ; 44 L. J. Ch. 192 ; 23 W. R. 249 ; 31 L. T. 866 ; where a very strong Court (Lord Cairns, L. C., and James and Mellish, L.JJ.), decided that the Court of Chancery has no jurisdiction to restrain the publication of a libel as such, even if it be injurious to property ; and expressly overruled *Dixon* v. *Holden* and *Springhead Spinning Co.* v. *Riley*.

The judgment of the Lord Chancellor is most clear and convincing on the point :—"Now, the comments and expressions in this pamphlet either do amount to a libel upon the company, or do not. If they do not amount to a libel, and are therefore innocuous and justifiable in the eye of a Court of Common Law, I am at a loss to

understand upon what principle the Court of Chancery could possibly interfere as a *censor morum* or critic to restrain the publication of statements or expressions which would be held justifiable in a Court of Common Law. If, on the other hand, these comments do amount to a libel, then, as I have always understood, it is clearly settled that the Court of Chancery has no jurisdiction to restrain the publication merely because it is a libel. There are publications which the Court of Chancery will restrain, and those publications, as to which there is a foundation for the jurisdiction of the Court of Chancery to restrain them, will not be restrained the less because they happen also to be libellous. It is attempted to give a colour to the application by saying that these are libellous publications which will injure property, and then, when that proposition is further defined, it is said that the business of the company, the goodwill of the company, is property; that the company in its trade will be injured, and that, therefore, the interference of the Court is asked for the protection of property. But with regard to nine out of ten libels the same thing might be said. The cases in which actions are brought for libel are usually cases where things are written of men or corporations, which have an effect upon their character and upon their trade or business, or their character as connected with trade or business; but no case can be [* 358] produced in which, in those circumstances, the Court of Chancery has interfered. Not merely is there no authority for this application, but the books afford repeated instances of the refusal to exercise jurisdiction. There are the observations of Lord Eldon in *Gee* v. *Pritchard;* the observations of Lord Campbell in the case of the *Emperor of Austria* v. *Day;* there is the *dictum* of Lord Langdale in the case of *Clark* v. *Freeman*, which stands irrespective of any comments which may be made upon the decision of that particular case; there is the observation of the late Vice-Chancellor of England in *Martin* v. *Wright;* and there are the observations of the late Vice-Chancellor Wickens in *Mulkern* v. *Ward*. Over and above those, there is the decision of the House of Lords in *Fleming* v. *Newton*, and it is clear to my mind, from reading the opinion of Lord Cottenham, whose was the only opinion pronounced in that case, that the whole of it proceeds on one footing. He considered that the case, being Scotch, some nicety of Scotch law might be made to appear in the Courts of Scotland which would entitle them to interfere with the publication complained of in that case, but that unless some such feature of Scotch law could be shown, no such interference could, upon the general principles of English law, be permitted. Now, the only shadow of authority the other way is in the case of *Dixon* v. *Holden*, decided by Vice-Chancellor Malins in the year 1869. I say nothing about the decision in that particular case, and I do not mean to say that the decision is not capable of being maintained. It professes to proceed mainly upon a case of *Routh* v. *Webster*. The authorities cited are: the case of *Fleming* v. *Newton*, which appears to me to be an authority exactly to the contrary; the case of *Routh* v. *Webster*, which was an authority for preventing the improper use of a man's name

against his will ; the case of *Clark* v. *Freeman*, where the injunction was refused, and where Lord Langdale said the Court would not interfere to prevent a libel ; and the only other case mentioned, *Springhead Spinning Co.* v. *Riley*, decided by the Vice-Chancellor himself, upon which of course the learned judge must be taken to have expressed the same opinion as he expressed in the case of *Dixon* v. *Holden*. I am unable to accede to these general propositions. They appear to me to be at variance with the settled practice and principles of this Court, and I cannot accept them as an authority for the present application. I think that this appeal must be refused with costs." Lord Justice James was of the same opinion. "I think it is right," he says, "to express my entire concurrence in the views just stated by the Lord Chancellor. I think that the Vice-Chancellor Malins, in that case of *Dixon* v. *Holden*, was, by his desire to do what [* 359] was right, led to exaggerate the jurisdiction of this Court in a manner for which there was no authority in any reported case, and no foundation in principle. I think it right to say that I hold without doubt that the statement of the law in that case is not correct." Lord Justice Mellish was "entirely of the same opinion."

The decision in *Prudential Asssurance Co.* v. *Knott* was followed by the Court of Appeal in *Fisher and Co.* v. *Apollinaris Co.*, L. R. 10 Ch. 297 ; 44 L. J. Ch. 500 ; 23 W. R. 460 ; 32 L. T. 628, and in Ireland in *Hammersmith Skating Rink Co.* v. *Dublin Skating Rink Co.*, 10 Ir. R. Eq. 235. Lord Justice James remarked in the former case : "The publication under such circumstances can hardly be a libel, and even if it was, there is abundance of authority that this Court has no jurisdiction to restrain the publication of a libel merely because it is a libel." (L. R. 10 Ch. at p. 302.) It must be taken, therefore, that, at the date of the Judicature Act coming into operation, it was clear law that no Court of Equity had any power to grant an injunction in a case of libel or slander. Vice-Chancellor Malins, however, appeared to retain his former opinion ; for in *Thorley's Cattle Food Co.* v. *Massam*, 6 Ch. D. 582 ; 46 L. J. Ch. 713, he held that the decision of the Court of Appeal was in some way controlled or overruled by sub-s. 8 of s. 25 of the Judicature Act, 1873, which had come into force in the meantime ; and that under that section any Court had power, before even a statement of claim was delivered, to grant an injunction "to prevent unfair trading, to prevent the issuing of a falsehood to the detriment of another." However, in deference to the decision in the *Prudential Assurance Co.* v. *Knott*, he refused the application made to him, and only granted the injunction when the matter came before him on the final hearing. (14 Ch. D. 763 ; 28 W. R. 295 ; 41 L. T. 524.)

But it has since been most clearly laid down by James, L. J., in *Day* v. *Brownrigg*, 10 Ch. D. 307 ; 48 L. J. Ch. 173 ; 27 W. R. 217 ; 39 L. T. 226, 553, that sub-s. 8 of s. 25 of the Judicature Act in no way alters the principles on which a Court of Equity should act in granting injunctions, in which view Jessel, M. R., apparently concurred. And Lord Coleridge, C. J., appears to be of the same opinion in *Saxby* v. *Easterbrook*, 3 C. P. D. 343 ; 27 W. R. 188.

The late Master of the Rolls, according to Lindley, J., 3 C. P. D. 342, refused to follow the *dictum* of Malins, V.-C., on the interlocutory application in *Thorley's Cattle Food Co.* v. *Massam* (probably in *Hinrichs* v. *Bernales*, Weekly Notes for 1878, p. 11). In *Beddow* v. *Beddow*, 9 Ch. D. 89; 47 L. J. Ch. 588; 20 W. R. 570, Jessell, M. R., pointed out that, while the jurisdiction of the Court of Chancery to grant an injunction [* 360] was limited by certain rules of settled practice, the Common Law Courts had a most extensive power vested in them by ss. 79, 81, and 82 of the Common Law Procedure Act; that every division of the High Court has now that power; that such power was only limited by the words "just or convenient;" that nothing could be convenient which was unjust; and that what is just "must be decided not by the caprice of the judge, but according to sufficient legal reasons or on settled legal principles." In *Gaskin* v. *Balls*, however (C. A.), 13 Ch. D. 329; 28 W. R. 552, Thesiger, L. J., remarked: "It is said that the Judicature Act alters the principles on which the Court is to proceed in such cases as the present. I see no ground for that contention. The Act has somewhat enlarged the powers of the Court, but in the matter of injunctions it has done nothing to alter the principles which have been laid down as to the exercise of its powers, where principles have been established as being just and convenient." In *Dicks* v. *Brooks*, 15 Ch. D. at p. 25, Bacon, V.-C., says: "I do not believe that s. 25, sub-s. 8, has added in the slightest degree to the power of this Court to grant an injunction." In *North London Rail. Co.* v. *G. N. Rail. Co.*, 11 Q. B. D. at pp. 37, 38, Brett, L. J., says: "It seems to me that the words 'just or convenient' do not increase the power of any part of the High Court to the extent of altering the rights of parties so as to give to either a right which did not exist in law at all before the Judicature Act. Therefore, in my opinion, there is nothing in the Judicature Act which enables any part of the High Court to issue an injunction in a case in which, before the Judicature Act, there was no legal right on the one side, or no legal liability on the other at law or in equity." And Cotton, L. J., says in the same case (at p. 40): "In my opinion the sole intention of the section is this: that where there is a legal right which was, independently of the Act, capable of being enforced either at law or in equity, then, whatever may have been the previous practice, the High Court may interfere by injunction in protection of that right. But undoubtedly one is bound to consider the cases which have been referred to in which it is said that a different interpretation had been put upon this section by the Master of the Rolls. In my opinion the Master of the Rolls does not in any one of them lay down any principle contrary to that which I have stated is the true principle of the Act." And this case was acted on and followed in *London & Blackwall Rail. Co.* v. *Cross* (C. A.), 31 Ch. D. 354; 55 L. J. Ch. 313; 54 L. T. 309.

Hence it is impossible to contend that the Judicature Act created any jurisdiction to grant injunctions in cases of libel or slander, which [*361] did not exist before the Judicature Act, either at law

or in equity. That there was no jurisdiction in equity to grant an injunction on an interlocutory motion is clear from the case of *Prudential Assurance Co.* v. *Knott*, which still remains of unimpaired authority. Can it be said that a Court of Common Law had such power before the Judicature Act? Certainly no Court of Common Law ever exercised such a power: no one ever applied to a Common Law Court for such an injunction. It would, I think, have greatly surprised the judges of the Queen's Bench or Common Pleas or the barons of the Exchequer to learn that they had jurisdiction to restrain the publication of an alleged libel on an interlocutory application, as well as after verdict, while the Courts of Equity had no jurisdiction to grant an injunction in either case.

It may be doubted whether the words of sects. 79 and 82 of the Common Law Procedure Act, 1854, are wide enough to include an application to restrain the publication of a libel. In *Sutton* v. *South Eastern Rail. Co.*, L. R. 1 Ex. 32; 4 H. & C. 325; 35 L. J. Exch. 38; 14 W. R. 133; 11 Jur. N. S. 935; 13 L. T. 438; Pollock, C. B. stated his opinion that the Court could not grant an injunction unless either a breach of contract or an injury to permanent property was shown. No one supposed that those sections had given a Court of Common Law more extensive powers than were possessed by a Court of Equity. In fact, it was expressly decided in *Mines Royal Society* v. *Magney*, 10 Ex. 489; 24 L. J. Ex. 7, that the powers so conferred were less extensive than those possessed by the Court of Chancery, being confined to cases in which a Court of Equity would grant an injunction without terms. The object of the section was, as Channell, B., says in *Sutton* v. *South Eastern Rail. Co.*, *supra*, "to save the suitor from the delay and expense which would be entailed on him if, to obtain redress, he were compelled to have recourse to a Court of Equity." On every application for an injunction at common law, the plaintiff had at least to prove that a Court of Equity would have granted him such relief. Moreover, at common law, the Court had always the greatest reluctance to anticipate the finding of the jury in an action of libel or slander. "Libel or no libel, since Fox's Act, is of all questions peculiarly one for a jury; and I can well understand a Court of Equity declining to interfere to restrain the publication of that which has not been found by a jury to be libellous." (Per Lord Coleridge, C. J., in *Saxby* v. *Easterbrook*). With the judgment of Lord Cottenham, L. C., in *Fleming* v. *Newton*, *ante*, p. 354, before them, no Court of Common Law would ever have restrained the publication of libel before verdict. There were, therefore, "sufficient legal reasons" and "settled legal principles" which prevented the Common Law [*362] Courts from ever granting such injunctions: hence, even admitting the authority *Beddow* v. *Beddow*, it is neither "just" nor "convenient" that such injunctions should be granted now.

Moreover, these sections are now repealed by the Statute Law Revision Act, 1883 (46 & 47 Vict. c. 49), though this repeal would not "affect any jurisdiction or principle, or rule of law or equity, established or confirmed" by them if there were any.

In conclusion, I must refer to one question raised by Fry, J., in *Thomas* v. *Williams*, 14 Ch. D. 864 ; 49 L. J. Ch. 605 ; 28 W. R. 983 ; 43 L. T. 91. To the actual decision in that case no one can take exception. It was a case of trade libel, and the plaintiff asked for an injunction to restrain the publication of circulars injurious to his business. The defendant was entitled to have the case tried by a judge and jury ; but he neglected to claim a jury at the proper time. He waited till all the evidence on both sides had been put in, and then applied at the final hearing to change the mode of trial. Fry, J., decided that this application was made too late, and that he had jurisdiction, sitting alone, to try the cause, and to grant an injunction, should he think fit, which no one would now dispute. The defendant had in fact tacitly consented to his lordship being both judge and jury. But, incidentally, Fry, J., remarked, "It was urged that the plaintiff is suing upon a libel, and that since Fox's Act no relief can be given by any Court upon a libel unless the libel has been in the first place submitted to the decision of a jury. That objection appears to me entirely untenable, because, when Fox's Act is looked at, it is plain that it applies only to proceedings by way of criminal information or indictment for libel, and has nothing whatever to do with civil actions based upon the libel."

This is literally true, no doubt ; but I wholly deny the correctness of the head-notes which draws from this remark the inference that "the defendant in a civil action for libel has the same right to a trial by jury as the defendant in any other civil action ; he has no higher right." For Fox's Act laid down no new principle ; the procedure which it rendered imperative in criminal cases was already, before that enactment, the invariable rule in all civil cases, and has remained so ever since : it had, in earlier days, been the rule in criminal cases also. As Littledale, J., says, in *Baylis* v. *Lawrence* (11 A. & E. at p. 925), "Although that Act applied more particularly to criminal cases, yet I know no distinction between the law in criminal cases and that in civil, in this respect. Therefore that which has been declared to be law in criminal cases is the law in civil cases." And see *Parmiter* v. *Coupland*, 6 M. & W. at p. 108.) The discovery, [* 363] therefore, that Fox's Act applies only to criminal cases in no way impairs the right of a defendant to demand that the question of libel or no libel be submitted to a jury, and not decided against him by the judge alone.

In none of the decisions since *Thomas* v. *Williams* has the question of jurisdiction ever been seriously considered. In *Quartz Hill Gold Mining Co.* v. *Beall* (20 Ch. D. 501 ; 51 L. J. Ch. 874 ; 30 W. R. 583 ; 46 L. T. 746), Mr. Higgins, Q. C., for the plaintiff, did indeed contend that there was no jurisdiction to grant an injunction on an interlocutory application. But the only case he cited to the Court was *Hinrichs* v. *Berndes*, in the Weekly Notes, whereupon the Master of the Rolls interposed with the remark, "You had better go to the merits. There is no doubt about the jurisdiction," and thereupon the learned counsel, having an overwhelming case on the merits, very wisely followed his Lordship's advice and succeeded.

It is always somewhat ungracious to argue that the Court has no jurisdiction; it is pleasanter and generally wiser to contend that the present case is not one in which the Court will exercise its powers. The leading case on the point—*Prudential Assurance Co.* v. *Knott*—was never cited to the Court, nor any of the other cases relied on above. And then the Master of the Rolls and Lords Justices Baggallay and Lindley gave judgment on insufficient materials, as I think, expressing their clear conviction that the Court had such jurisdiction under sects. 79 and 82 of the Common Law Procedure Act of 1854. In *Hill* v. *Hart Davies*, Cookson, Q. C., is reported as stating (21 Ch. D. at p. 799), "*Prudential Assurance Co.* v. *Knott* is no longer law," and for that proposition he cites *Thomas* v. *Williams* and *Bedlow* v. *Bedlow*; this proposition was apparently not denied by counsel for the defendants; and Kay, J., in his judgment, treated it as clear law. "As to the law," he says, "I have no doubt whatever about it. It seems to me that it is perfectly settled that any libel which is calculated to injure another man in his trade, or a trading company, will be restrained by injunction, and although there has been, it is said, no reported case which applies that law and practice to a friendly society or joint stock company, I have not the least doubt that it is as applicable to the case of a friendly society or joint stock company as it is to an individual trader."

When it came to asking for an injunction to restrain a *slander* in *Hermann Loog* v. *Bean*, 26 Ch. D. 306; 53 L. J. Ch. 1128; 32 W. R. 994; 51 L. T. 442; 48 J. P. 708, counsel for the defense did at last make a stand. Mr. Oswald argued stoutly that, "oral slander is only fit to be tried before a jury. There is only one case in which [* 364] the Court has interfered by interlocutory injunction against a written libel, and there is no case in which it has interfered at all to restrain oral statements." But it was now too late. Cotton, L. J., says, "The Court has of late granted injunctions in cases of libel, and why should it not also do so in cases of slander? The defendant—though, no doubt, the tongue is an unruly member to govern—must take care that he keeps his tongue in order, and does not allow it to repeat those statements which he is by the injunction restricted from uttering." Bowen, L. J., similarly asks, "can there be any distinction in principle between a slander which is contained in a written document, and a slander which is not?" Similarly, other judges hereafter will ask: If the Court has power to restrain slanders injurious to a trader, why not also slanders injurious to a lawyer or a doctor, to a magistrate or a judge, to a nobleman or a cabinet minister? If we may order a man to hold his tongue in one class of actionable slanders, why not in all? To charge a man with crime is surely a more serious offence than to throw doubts on his solvency. Prevention is better than cure. *Boni judicis est ampliare jurisdictionem.*

Not a word is said as to jurisdiction in any of the later cases.

These decisions have been received with respectful astonishment in America (*Greene* v. *N. Y. Dealers' Protection Association*, 39 Hun. (46 New York Supr. Ct.) 300), but have been followed in Ireland in *Punch* v. *Boyd and others*, 16 L. R. Ir. 476.

I must admit, therefore, that it is now settled practice in the Chancery Division to grant injunctions to restrain libels and slanders on an interlocutory application ; but I think it is my duty to state my opinion, for what it is worth, that such practice is an unconstitutional innovation, and a violation of the liberty of the press and of the right of free speech.

CHAPTER XII. [*350]

COSTS.

If an action of slander or libel be tried by a jury, the costs always follow the event unless the Judge before whom such action is tried or the Court shall for good cause otherwise order. (Order LXV. r. 1.) If by any chance such an action be tried by a judge alone (which it very seldom is, except in the case of trade libels ; *Thomas* v. *Williams*, 14 Ch. D. 864 ; 49 L. J. Ch. 605 ; 28 W. R. 983 ; 43 L. T. 91), the costs are absolutely in his discretion. The provisions of the County Courts Act, 1867 (30 & 31 Vict. c. 142, s. 5,) no longer apply to actions of libel or slander, since s. 67 of the Judicature Act, 1873, came into operation : for no action of either slander or libel can be brought in the County Court, except by consent.

Formerly the provisions of the County Court Act applied to all actions, whether they could be brought in the County Court or not ; the words of the Act being wider than the Legislature intended. (*Sampson* v. *Mackay*, L. R. 4 Q. B. 643 ; 10 B. & S. 694 ; 38 L. J. Q. B. 245 ; 17 W. R. 883 ; 20 L. T. 807 ; *Gray* v. *West ex ux.*, L. R. 4 Q. B. 175 ; 9 B. & S. 196 ; 38 L. J. Q. B. 78 ; 17 W. R. 497 ; 20 L. T. 221 ; *Craven* v. *Smith*, L. R. 4 Ex. 146 ; 38 L. J. Ex. 90 ; 17 W. R. 710 ; 20 L. T. 400 ; *Kent* v. *Lewis*, 21 W. R. 415.) Formerly also the provisions of Lord Denman's Act (3 & 4 Vict. c. 24, s. 2) applied to actions of slander and libel, and therefore a plaintiff who recovered less than 40*s.* damages could not recover any costs whatever from the defendant unless the judge immediately certified on the record that the slander or libel was wilful and malicious. But even if the judge certified both that the action was one fit to be tried in the Superior Court, and also that the slander was wilful and malicious, so as to take the case out of both the 30 & 31 Vict. c. 142, s. 5, and [*366] the 3 & 4 Vict. c. 24, s. 2, still no certificate could enable a plaintiff to get more costs than damages if he sued for a slander actionable *per se*, and recovered less than 40*s.* (*Evans* v. *Rees*, 9 C. B. N. S. 391 ; 30 L. J. C. P. 16 ; *Marshall* v. *Martin*, L. R. 5 Q. B. 239 ; 39 L. J. Q. B. 85 ; 18 W. R. 378 ; 21 L. T. 788.) For the relentless words of the 21 Jac. I. c. 16, contain no proviso enabling a judge to make any exemption from the imperative rule that a plaintiff, suing on the case for slanderous words, and recovering less than 40*s.*, shall have "only so much costs as the damages so given or assessed amount unto." This statute, 21 Jac. I. c. 16, was held to apply only to words actionable *per se*, and not to actions of libel,

of slander of title, of *scandalum magnatum*, or where the words are actionable only by reason of special damage alleged.

But both the 21 Jac. I. c. 16, and the 3 & 4 Vict. c. 24, s. 2, and all special Acts relating to costs, are now repealed by s. 33 of the Judicature Act, 1875 (*Parsons* v. *Tinling*, 2 C. P. D. 119; 46 L. J. C. P. 230; 25 W. R. 255: 35 L. T. 851; *Garnett* v. *Bradley* (C. A.), 2 Ex. D. 349; 46 L. J. Ex. 545; 25 W. R. 653; 36 L. T. 725; (H. of Lds.) 3 App. Cas. 944; 48 L. J. Ex. 186; 26 W. R. 698; 39 L. T. 261; *Ex parte Mercers' Company*, 10 Ch. D. 481; 48 L. J. Ch. 384; 27 W. R. 424); while the County Courts Act, 1867, is, by the express words of s. 67 of the Judicature Act of 1873, restricted to actions in which relief can be given in a County Court; and slander and libel are not among such actions. (County Courts Act, 1846 (9 & 10 Vict. c. 95), s. 58.)

Hence now, if a plaintiff recovers nominal damages merely, he will get his costs, unless the judge or a Divisional Court otherwise orders. The defendant's counsel must at once apply to the judge to made an order depriving the plaintiff of his costs. But as a rule such an order will only be made where "contemptuous" damages, such as a farthing or a shilling, have been given, and not always then. There must be some "good cause" for such an order; something either in the conduct of the parties or in the facts of the case which, in spite of the finding of the jury, makes it more just that an exceptionable order should be made. If there be no such "good cause," the Court of Appeal will set the order aside. If there be any [*367] such "good cause," then the Court of Appeal will not interfere with the judge's discretion, though they may not approve of the way in which he has exercised it. (*Jones* v. *Curling and another* (C. A.), 23 Q. B. D. 262; 53 L. J. Q. B. 383; 32 W. R. 651; 50 L. T. 349; *Sutcliffe* v. *Smith*, 2 Times L. R. 881; but see *Huxley* v. *West London Extension Ry. Co.*, 17 Q. B. D. 373.)

But if the judge chooses to make an order, that order is not necessarily that each party should pay his own costs. He may for *very* good cause order that the successful plaintiff should pay defendant's costs, as well as his own (see per Bramwell, L. J., 15 Ch. D. at p. 41); and where there has been a nonsuit, and a new trial, the judge who tries the case the second time may order that the successful plaintiff shall pay the whole costs of both trials. (*Harris* v. *Petherick* (C. A.), 4 Q. B. D. 611; 48 L. J. Q. B. 521; 28 W. R. 11; 41 L. T. 146.) But of course such an order would only be made in an extreme case, and where the plaintiff has misconducted himself. (See *Norman* v. *Johnson*, 29 Beav. 77.) A successful defendant cannot be made to pay the whole costs of the action under any circumstances. (*Dicks* v. *Yates*, (C. A.), 18 Ch. D. 76, 85; 50 L. J. Ch. 309; 44 L. T. 660; *Re Foster* v. *Great Western Rail. Co.*, 8 Q. B. D. at pp. 521, 522; 30 W. R. 398.)

Illustrations.

Where an action of libel was brought on a private letter written by a lady to an intimate friend, and shown only to the plaintiff and two others, and the plain-

tiff's own conduct had given rise to the suspicions entertained by the writer, and the jury gave a verdict for 10*l.* damages; Huddleston, B., made an order depriving him of costs, and his discretion was approved both in the Divisional Court and in the Court of Appeal.

Harnett v. *Vise and Wife* (C. A.), 5 Ex. D. 307; 29 W. R. 7.

Where a defendant denied publication, pleaded privilege, and also paid ten shillings into Court, and the jury found for the plaintiff on all the other issues except the last, as to which they found that the amount paid into Court was sufficient, Palles, L. C. B., gave judgment for the defendant without costs, and the Divisional Court refused to interfere with his discretion.

Kearney v. *Harrison*, 10 L. R. Ir. 17.

[*368] This rule as to nominal damages carrying costs applies in all Courts whatsoever in England, and to all actions of slander and libel, wherever tried, so long as they come before a jury. Thus, in the Salford Hundred Court of Record (*Turner* v. *Heyland*, 4 C. P. D. 432; 49 L. J. C. P. 535; 41 L. T. 556), or in the Liverpool Court of Passage (*King* v. *Hawkesworth*, 4 Q. B. D. 371; 48 L. J. Q. B. 484; 27 W. R. 660; 41 L. T. 411), the rule is the same as in the High Court. The law is the same in Ireland in all actions tried since the 53rd section of the Judicature Act (Ireland), 1877, came into operation. (*Cassidy* v. *O'Loghlen*, 4 L. R. Ir. 1, 731.) And it is so in New South Wales also. (*Harris* v. *Davies*, 10 App. Cas. 279; 54 L. J. P. C. 15.)

I presume that Order LXV. rule 1 applies to the trial of a remitted action before a County Court judge and a jury. A County Court judge had power to certify under the 30 & 31 Vict. c. 142. (*Taylor* v. *Cass*, L. R. 4 C. P. 614; 17 W. R. 860; 20 L. T. 667. But though it was held formerly that an under-sheriff executing a writ of inquiry was a "judge" within that Act (*Craven* v. *Smith*, L. R. 4 Ex. 146; 38 L. J. Ex. 90; 17 W. R. 710; 20 L. T. 400), yet it would seem that such an assessment of damages is not the trial of "any action, cause, matter or issue" by a jury; that the costs do not therefore necessarily follow the event; but that the judge at chambers has after the return to the writ discretionary power to deprive the plaintiff of costs. (*Gath* v. *Howarth*, Weekly Notes, 1884, p. 99; Bitt. Ch. Cas. 79.) A master to whom an action is referred with the powers of a judge at Nisi Prius, may, in his award, make any order as to costs, not inconsistent with the terms of the submission. (*Bedwell* v. *Wood*, 2 Q. B. D. 626; 36 L. T. 213.) It is, however, usual in references to give the arbitrator express power over the costs. I can only find one case reported in which an action of libel has been referred. (*Jones* v. *Young*, 2 H. & C. 270; 32 L. J. Ex. 254.)

Special Costs.

Application for any special costs, such as those of shorthand writer's notes, or of a commission abroad, or of a special jury, or of photographic copies of the libel, should be made when judgment is delivered. [*369] No order will be made as to such costs after the judgment has been drawn up; they must be borne by the party

who has incurred them. (*Ashworth* v. *Outram*, 9 Ch. D. 483 ; 27 W. R. 98 ; 39 L. T. 441 ; *Executors of Sir Rowland Hill* v. *Metropolitan District Asylum*, 49 L. J. Q. B. 668 ; 43 L. T. 462 ; W. N. 1880, p. 98 ; *Davey* v. *Pemberton*, 11 C. B. (N. S.) 629.) To entertain such an application would substantially be to rehear the cause. (*In re St. Nazaire Co.*, 12 Ch. D. 88 ; 27 W. R. 854 ; 41 L. T. 110.)

Costs of Separate Issues.

By Order LXV. rule 2, when issues in fact and law are raised upon a claim or counterclaim, the costs of the several issues respectively, both in law and fact, shall, unless otherwise ordered, follow the event.

Under the former rule it was decided that where the plaintiff joined several distinct causes of action in one suit, and succeeded as to some, and failed as to others, the word "event" must be read distributively, and the defendant was entitled to tax his costs of the issues found for him, unless the Court or a judge otherwise ordered. (*Myers* v. *Defries*, 5 Ex. D. 15, 180 ; 48 L. J. Ex. 446 ; 49 L. J. Ex. 266 ; 28 W. R. 258, 406 ; 41 L. T. 659 ; 42 L. T. 137 ; *Davidson* v. *Gray*, 5 Ex. D. 189, n. ; 40 L. T. 192 ; (C. A.) 42 L. T. 834.) So if plaintiff was nonsuited as to one cause of action, but succeeded on another. (*Abbott* v. *Andrews*, 8 Q. B. D. 648 ; 51 L. J. Q. B. 641; 30 W. R. 779.) But there was formerly great difficulty in inducing a taxing-master to apportion the costs of the various issues arising out of the same cause of action. (See *James* v. *Brook*, 16 L. J. Q. B. 198 ; *Prudhomme* v. *Fraser*, 2 A. & E. 645 ; *Goodburne* v. *Bowman*, 9 Bing. 667 ; *Biddulph* v *Chamberlayne*, 17 Q. B. 351 ; *Reynolds* v. *Harris*, 3 C. B. N. S. 267 ; 28 L. J. C. P. 26 ; *Skinner* v. *Shoppee, et ux.*, 6 Bing. N. C. 131 ; 8 Scott, 275 ; *Empson* v. *Fairfax*, 8 A. & E. 296 ; 3 N. & P. 385 ; *Harrison* v. *Bush*, 5 E. & B. 344 ; 25 L. J. Q. B. 99 ; 2 Jur. N. S. 90.) The judges seemed to think it was impossible to apportion costs with such minuteness. (See per Bramwell, L. J., in 4 Q. B. D. at p. 612.) If the taxing-master adopted some rough and ready method of apportionment (as in *Knight* v. *Pursell*, 49 L. J. Ch. 120 ; 28 W. R. 90 ; 41 L. T. 581), this was considered all that could be expected of him.

But now the above rule is imperative. Hence, in future, if a defendant in an action of defamation both justifies and pleads privilege, and fails on the first plea and wins on the second, the plaintiff must [*370] pay the general costs of the action, for he ought never to have brought it ; but all extra costs occasioned by the plea of justification must be paid by the defendant, unless the judge at the trial makes an order to the contrary. There are of course practical difficulties in the way of such a taxation. It is difficult for the master, who was not at the trial, to determine whether it was, or was not, solely in consequence of the plea of justification that a particular witness was subpœnaed, or a particular page of the brief prepared. The plan adopted is to tax the costs of the action generally in favour of the defendant, and then deduct such sum as the plaintiff can prove to have been occasioned by the

plea of justification. And so in other cases where several distinct issues are raised. (See *Sparrow* v. *Hill* (C. A.), 8 Q. B. D. 479 ; 50 L. J. Q. B. 675 ; 29 W. R. 705 ; 44 L. T. 917.)

Payment into Court.

Money cannot now be paid into Court in any action of libel or slander without admitting the plaintiff's cause of action ; no defence can be pleaded at the same time. (Order XXII. rule 1.) *Hawkesley* v. *Bradshaw* (C. A.), 5 Q. B. D. 302 ; 49 L. J. Q. B. 333 ; 28 W. R. 557 ; 42 L. T. 285, is no longer law. If the plaintiff accepts the sum paid into Court in satisfaction of his claim, he must give the defendant notice to that effect, and may then proceed to tax his costs, and in case of non-payment within forty-eight hours may sign judgment for his costs. But even in this case the plaintiff is subject to the general jurisdiction of the Court, and may be deprived of his costs, if the whole action was useless or malicious. (*Broadhurst* v. *Willey*, Weekly Notes, 1876, p. 21 ; *Nichols* v. *Evens*, 22 Ch. D. 611 ; 52 L. J. Ch. 383 ; 31 W. R. 412 ; 48 L. T. 66.) If the plaintiff does not accept the sum paid into Court, but continues his action for damages *ultra*, he will recover the whole of his costs of the action should the jury deem the amount paid into Court insufficient ; if, on the other hand, they think it sufficient, the defendant will be entitled to the whole costs of the action (*Langridge* v. *Campbell*, 2 Ex. D. 281 ; 46 L. J. Ex. 277 ; 25 W. R. 351 ; 36 L. T. 64 ; *Goutard* v. *Carr* (C. A.), 13 Q. B. D. 598, n. ; 53 L. J. Q. B. 55, 467, n. ; 32 W. R. 242) ; unless the Court or a judge think fit to make a special order that the plaintiff shall have his costs of the action up to the time when the money was paid into Court, and the defendant shall have only his costs incurred after that time, as in *Buckton* v. *Higgs*, 4 Ex. D. 174 ; 27 W. R. 802 ; 40 L. T. 755 ; and see *The William Symington*, 10 P. D. 1 ; 51 L. T. 461.

[* 371] *Counterclaim.*

It is very seldom that there is a counterclaim in an action of libel or slander ; but whenever there is, its presence always complicates the question of costs. In an action for libel or slander there can be no set-off, as the damages claimed are unliquidated ; in other words, the counterclaim is not a defence to the plaintiff's action, but a cross-action by the defendant against the plaintiff. It is clear, moreover, that the County Courts Act, 1867, does not apply to actions of libel or slander, nor to counterclaims of any kind. (*Blake* v. *Appleyard*, 3 Ex. D. 195 ; 47 L. J. Ex. 407 ; 26 W. R. 592.) It follows, therefore, that where the plaintiff's claim is either for libel or slander, and the defendant sets up any counterclaim, and both recover, then, as Brett, L. J., says in *Baines* v. *Bromley* (C. A.), 6 Q. B. D. at p. 695 ; 50 L. J. Q. B. 465 ; 29 W. R. 706 ; 44 L. T. 915, "the proper principle of taxation, if not otherwise ordered, is to take the claim as if it and its issues were an action, and then to

take the counterclaim and its issues as if it were an action, and then to give it the *allocatur* for costs for the balance in favour of the litigant in whose favor the balance turns. In such a case where items are common to both actions the master would divide them." [This *dictum* is in accordance with the earlier decisions in *Cole, Marchant & Co.* v. *Firth and another*, 4 Ex. D. 301; 40 L. T. 857; *Davidson* v. *Gray, Barrow & Co.*, 5 Ex. D. 189, n.; 40 L. T. 192; (C. A.) 42 L. T. 834; and *Stooke* v. *Taylor*, 5 Q. B. D. 569; 49 L. J. Q. B. 857; 29 W. R. 49; 43 L. 208; and has since been recognized as good law in *Re Brown, Ward* v. *Morse* (C. A.), 23 Ch. D. 377; 52 L. J. Ch. 324; 31 W. R. 936; 49 L. T. 68; and in *Lowe* v. *Holme and another*, 10 Q. B. D. 286; 52 L. J. Q. B. 270; 31 W. R. 400. It is, however, apparently in conflict with *Hallinan* v. *Price*, 27 W. R. 490; 41 L. T. 627; and *Waring* v. *Pearman*, 32 W. R. 429; 50 L. T. 633. The counterclaim in *Lund* v. *Campbell and others* (C. A.), 14 Q. B. D. 821; 54 L. J. Q. B. 281; 33 W. R. 510, was really a set off.] If the plaintiff recover any sum at all, even a farthing, and the defendant nothing on his counterclaim, then the plaintiff, in the absence of any special order to the contrary, is entitled to the whole costs of the action. (*Potter* v. *Chambers*, 4 C. P. D. 457; 48 L. J. C. P. 274; 57 W. R. 414.) If neither plaintiff nor defendant recover anything on either claim or counterclaim, the plaintiff pays the general costs of the action, including those common to both claim and counterclaim, for he commenced the litigation; the defendant pays only such costs as the plaintiff can prove to have been occasioned by the counterclaim. (*Saner* v. *Bilton*, 11 Ch. D. 416; [* 372] 48 L. J. Ch. 545; 27 W. R. 472; 40 L. T. 134; *Mason* v. *Brentini* (C. A.), 15 C. H. D. 287; 29 W. R. 126; 42 L. T. 726; 43 L. T. 557.) If, however, the action be not of libel or slander, but be such that it could have been brought in the County Court, then the plaintiff cannot, without a special order, recover any costs at all from the defendant, unless the damages exceed 20*l.* in an action of contract, or 10*l.* in an action of tort; while the defendant is entitled to recover on his counterclaim in libel or in slander all the costs of his counterclaim, if he recover only a farthing thereunder. (*Staples* v. *Young*, 2 Ex. D. 324; 25 W. R. 304; *Chatfield* v. *Sedgwick*, 4 C. P. D. 459; 27 W. R. 790; 41 L. T. 438; *Rutherford* v. *Wilkie*, 41 L. T. 435; *Ahrbecker & Son* v. *Frost*, 17 Q. B. D. 606; 55 L. T. 264.)

Remitted Action.

When an action of libel or slander is remitted to the County Court, under sect. 10 of the County Courts Act, 1867 (30 & 31 Vict. c. 142), the costs will follow the event, unless the judge at the trial make any order to the contrary (County Courts Act, 1846, 9 & 10 Vict. c. 95, s. 98); the costs of the proceedings in the Superior Court will be allowed according to the scale in use in the Superior Court; the costs incurred subsequent to the order of reference according to the County Court scale.

Costs of former Trial.

The costs of the first trial abide the event of the second, unless any special order be made when the new trial is granted, or at the second trial. (*Creen* v. *Wright*, 2 C. P. D. 354 ; 46 L. J. C. P. 427 ; 25 W. R. 502 ; 36 L. T. 355 ; *Field* v. *Great Northern Rail. Co.*, 3 Ex. D. 261 ; 26 W. R. 817 ; 39 L. T. 80.)

Husband and Wife.

If a married woman having general separate estate fail in an action of libel or slander, she may be condemned in costs, although her husband was joined with her as a co-plaintiff or a co-defendant. (*Newton and Wife* v. *Boodle and others*, 4 C. B. 359 ; 18 L. J. C. P. 73 ; *Morris* v. *Freeman and Wife*, 3 P. D. 65 ; 47 L. J. P. D. & A. 79 ; 27 W. R. 62 ; 39 L. T. 125 ; and see the remarks of Jessel, M. R., in *Besant* v. *Wood*, 12 Ch. D. 630 ; 40 L. T. 453 ; and sects. 1 and 13 of the Married Women's Property Act, 1882, *post*, pp. 396, 401.)

Public Bodies.

[*373] If the officers of any corporation, local board, company, or other public body be libelled or slandered, and take either civil or criminal proceedings to clear themselves, the costs must not be paid out of the corporate funds, which were contributed for other purposes. If, however, it be the company itself that is libelled or slandered, the directors may, of course, employ the company's funds in its own defence.

Illustrations.

The house surgeon of the Marylebone workhouse was dismissed by the guardians in consequence of differences which had arisen between him and the honorary physician of the parish infirmary. The house surgeon thereupon brought actions of libel and slander against the honorary physician, and also against the assistant surgeon of the workhouse. He failed in both, became bankrupt, and disappeared. The guardians thereupon paid the costs incurred by their officers out of the poor's-rates ; and the poor-law auditors allowed the payments. But Knight-Bruce, V.-C., held such payment a breach of trust, and ordered those guardians who had authorized it to refund the amount out of their own pockets.

Attorney-General v. *Compton*, 1 Younge & Collyer, Eq. 417.

A Turkish railway company was managed by English directors. Ellissen wrote a letter to Lord Stanley (then Secretary for Foreign Affairs), charging the directors with mismanaging the affairs of the company and misappropriating its funds. At a general meeting of the shareholders a resolution was passed requesting the directors "to adopt the strongest possible measures to put an end to such mischievous action." The directors accordingly prosecuted Ellissen for libel. Wickens, V.-C., held that the costs of such prosecution should not be paid out of the assets of the company, though he would not, under the circumstances, order the directors to repay any costs already so paid.

Pickering v. *Stephenson*, L. R. 14 Eq. 322; 41 L. J. Ch. 493 ; 20 W. R. 654; 26 L. T. 608.

A former employe of the Army and Navy Stores took to walking up and

down in front of their door, carrying sandwich-boards placarded with violent attacks upon the society, denouncing it as "a swindle, and counterfeit," and also upon the directors. *Held*, that as these libels were clearly calculated to injure the credit of the society, and to diminish its business, the costs of a prosecution might rightly be paid out of the funds of the society.

Studdert v. *Grosvenor*, 33 Ch. D. 528; 55 L. J. Ch. 689; 34 W. R. 754; 55 L. T. 171; 50 J. P. 710.

As to costs in criminal proceedings, see, as to indictments, *post*, p. 609; as to criminal informations, *post*, p. 614.

[*374]

CHAPTER XIII.

THE NEWSPAPER LIBEL AND REGISTRATION ACT, 1881.

In 1879, Mr. Hutchinson moved for the appointment of a select committee of the House of Commons to inquire into the law of newspaper libel. The committee was appointed, but owing to the short time at its disposal, did not report. It was re-appointed in 1880, and reported on July 14th, 1880. A copy of the report will be found on pp. 662–3, of the first edition of this book. In 1881, a Bill was introduced, embodying the recommendations of the committee, and passed hurriedly through both Houses, in spite of the protests of Lord Redesdale. There was certainly no adequate discussion of the measure in either House.

Mr. Baron Pollock says of it in *Ex parte Hubert Hurter and Son*, 47 J. P. 724 ; 15 Cox, C. C. 166 ; 74 Law Times (Newspaper), p. 229: "That act was a sort of settlement between the public on the one hand and newspaper proprietors on the other. On the one hand, proprietors of newspapers are to be registered, and on the other hand, they are protected by the Act from what the legislature deemed to be not necessarily trivial, but improper or unnecessary prosecutions for libel." If so, I think the public have got the best of the bargain.

The former statutes requiring registration (10 Anne, c. 19, ss. 111—114; 38 Geo. III. c. 78; and 6 & 7 Will. IV. c. 76) had all been repealed in 1870 by the 33 & 34 Vict. c. 99.

THE NEWSPAPER LIBEL AND REGISTRATION ACT, 1881.

[44 & 45 Vict. c. 60.] [*375]

ARRANGEMENT OF SECTIONS.

Section.
1. Interpretation.
2. Newspaper reports of certain meetings privileged.
3. No prosecution for newspaper libel without fiat of Attorney-General.
4. Inquiry by Court of Summary Jurisdiction as to libel being for public benefit or being true.
5. Provision as to summary conviction for libel.
6. 22 & 23 Vict. c. 17, made applicable to all libels.
7. Board of Trade may authorise registration of the names of only a portion of the proprietors of a newspaper.
8. Register of newspaper proprietors to be established.
9. Annual returns to be made.
10. Penalty for omission to make annual returns.
11. Power to make return on transfer.
12. Penalty for wilful misrepresentation in or omission from return.
13. Registrar to enter returns in register.
14. Fees payable for registrar's services.
15. Copies of entries in and extracts from register to be evidence.
16. Recovery of penalties and enforcement of orders.
17. Definitions.
18. Provisions as to registration of newspaper proprietors not to apply to newspaper belonging to a joint-stock company.
19. And not to extend to Scotland.
20. Short title.

SCHEDULES.

[* 376] 44 & 45 VICT. c. 60.

An Act to amend the Law of Newspaper Libel, and to provide for the Registration of Newspaper Proprietors.

[27th August, 1881.]

WHEREAS it is expedient to amend the law affecting civil actions and criminal prosecutions for newspaper libel:

And whereas it is also expedient to provide for the registration of newspaper proprietors:

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. *Interpretation.*]—In the construction of this Act, unless there is anything in the subject or context repugnant thereto, the several words and phrases hereinafter mentioned shall have and include the meanings following; (that is to say,)

The word "registrar" shall mean in England the registrar for the time being of joint stock companies, or such person as the Board of Trade may for the time being authorise in that behalf, and in Ireland the assistant registrar for the time being of joint stock companies for Ireland, or such person as the Board of Trade may for the time being authorise in that behalf.

The phrase "registry office" shall mean the principal office for the time being of the registrar in England or Ireland, as the case may be, or such other office as the Board of Trade may from time to time appoint.

The word "newspaper" shall mean any paper containing public news, intelligence, or occurrences, or any remarks or observations therein [*sic;* an obvious misprint for [* 377] "thereon"] printed for sale, and published in England or Ireland periodically, or in parts or numbers at intervals not exceeding twenty-six days between the publication of any two such papers, parts, or numbers.

Also any paper printed in order to be dispersed, and made public weekly or oftener, or at intervals not exceeding twenty-six days, containing only or principally advertisements.

The word "occupation" when applied to any person shall mean his trade or following [*qu.* calling], and if none, then his rank or usual title, as esquire, gentleman.

The phrase "place of residence" shall include the street, square, or place where the person to whom it refers shall reside, and the number (if any) or other designation of the house in which he shall so reside.

The word "proprietor" shall mean and include as well the sole proprietor of any newspaper, as also in the case of a divided proprietorship the persons who, as partners or otherwise, represent and

are responsible for any share or interest in the newspaper as between themselves and the persons in like manner representing or responsible for the other shares or interests therein, and no other person.

The above definition of a "newspaper" is taken almost *verbatim* from Schedule (A.) of the 6 & 7 Will. IV. c. 76, which was repealed by the 33 & 34 Vict. c. 99. It was held that a paper or pamphlet, though printed for sale, and containing public news, was not "a newspaper" within the former Act, if published periodically at intervals exceeding twenty-six days. (*Att.-Gen.* v. *Bradbury and Evans* (1851), 7 Exch. 97 ; 21 L. J. Ex. 12 ; 16 Jur. 130.)

2. *Newspaper reports of certain meetings privileged.*]—Any report published in any newspaper of the proceedings of a public meeting shall be privileged, if such meeting was lawfully convened for a lawful purpose and open to the public, and if such report was fair and accurate and published without malice, and if the publication of the matter [*378] complained of was for the public benefit ; provided always, that the protection intended to be afforded by this section shall not be available as a defence in any proceeding, if the plaintiff or prosecutor can show that the defendant has refused to insert in the newspaper in which the report containing the matter complained of appeared a reasonable letter or statement of explanation or contradiction by or on behalf of such plaintiff or prosecutor.

This section was inserted in consequence of the decision of the Court of Appeal in *Purcell* v. *Sowler*, 2 C. P. D. 215 ; 46 L. J. C. P. 308 ; 25 W. R. 362 ; 36 L. T. 416 ; 41 J. P. 789, in which it was decided that a fair and accurate report published in a local newspaper of the proceedings at a meeting of a board of guardians was not privileged. It will, I presume, protect the printer and reporter, as well as the proprietor and editor of a newspaper ; although the concluding proviso seems to contemplate that the defendant will have the power to admit or exclude a letter of explanation at his pleasure.

Prior to this Act no report of any public meeting was privileged, merely on the ground that it was an honest and accurate report of what had really taken place. (*Ante*, p. 266.) The defendant had to prove either that the words he had reported were true, or that they were *bonâ fide* comments on a matter of public interest.

I do not think that this section will afford much protection to the newspapers. The privilege conferred is very cautiously guarded. The defendant will have to prove—

(a) That the meeting was a public meeting,
(b) Lawfully convened
(c) For a lawful purpose,
(d) And open to the public ;
(e) That the report was fair and accurate
(f) And published without malice,

(g) And that the publication of the matter complained of was for the public benefit ;

(h) And, after proving all these facts, the defendant will lose his privilege if the plaintiff or prosecutor can show that the defendant refused, when asked, to insert a reasonable letter of explanation or contradiction.

I think that at common law, without this section at all, a report which complied with all the above conditions would have been held no libel ; for I presume no publication will be held to be "for the [*379] public benefit," unless it relate to some matter of public interest within the rules laid down on pp. 40—62.

(*a*), (*d*) *Public Meeting.*

What is "a public meeting," "open to the public"? There are, as yet, no decisions reported on this point ; but I am informed that Lord Coleridge, C J., expressed an opinion at the Swansea Winter Assizes, 1886, in a case of *Hughes* v. *Gibson*, that a meeting of a board of guardians was not such a public meeting, although reporters were admitted. If so, Mr. Sowler would be held liable just as he was before this Act.

It follows that no meeting of a town council or vestry is a public meeting within this section, or any other meeting at which the public are present merely as spectators. It is not enough that any respectable citizen could in fact gain admittance to the room, if when admitted he could neither speak nor vote, nor take any part, legitimately, in the proceedings.

At the same time, it is probably giving too narrow an effect to the section to limit it to meetings which are open to the public by law, and not by the permission of the conveners. There are very few meetings to which the public have a right to insist on admission. So, too, if the meeting is open to the bulk of the community, it would probably be deemed a public meeting, though some few were excluded—*e.g.*, where a meeting is summoned of the electors of a borough, or even of the ratepayers of a particular parish. But I presume that a meeting to which only Liberals or only Conservatives were invited, or a meeting of the members of some religious denomination, would not be within the section. Meetings of creditors, meetings of shareholders in a company, &c., are clearly not "public meetings."

Again, is a meeting "open to the public" when any one may enter, but only on payment of some fixed charge for admission? The legislature, it will be observed, is not content with the phrase, "a public meeting" ; it goes on to say, "and open to the public." A lecture or concert, for which seats are reserved long beforehand at high prices, could hardly be called a public meeting. But I incline to think that if the meeting was public in all other respects, the mere fact that a small charge was made for admission will not take the case out of the section. (See *Langrish* v. *Archer*, 10 Q. B. D. 44 ; 52 L. J. M. C. 47 ; 31 W. R. 183 ; 47 L. T. 548 ; 47 J. P. 295 ; 15 Cox, C. C. 194.)

[*380] (c) *For a Lawful Purpose.*

Next, the defendant must show that the meeting "was lawfully convened for a lawful purpose." Seditious or illegal meetings must not be reported, apparently. Seditious meetings are prohibited by 39 Geo. III. c. 19 (repealed in part by 32 & 33 Vict. c. 24, s. 1), and by 57 Geo III. c. 19 (repealed in part by 36 & 37 Vict. c. 91, s. 1). Meetings which are convened for the *bonâ fide* purpose of reforming our laws by petitioning parliament, or by other lawful means, are not seditious; but whenever persons assemble to bring the constitution into contempt, and to excite discontent, and disaffection against the king's government, it is an illegal meeting. (*R.* v. *Hunt and others*, 3 B. & Ald. 566; *Redford* v. *Birley*, 3 Stark. at p. 103.)

So, if persons meet for a purpose which, if executed, would make them rioters, but separate without carrying their purpose into effect, this is an unlawful assembly, though they have done nothing. (*Rex* v. *Birt and others*, 5 C. & P. 154.) A meeting called "to adopt preparatory measures for holding a national convention" was held an illegal meeting in *Rex* v. *Vorsey*, 6 C. & P. 81.

Again, the manner of holding the meeting may render it an unlawful meeting. Thus, any assembly is unlawful which meets *under circumstances* likely to endanger the peace of the neighbourhood; and, in order to decide whether an assembly is or is not unlawful, the jury may take into consideration the tumultuous way in which the meeting assembled, the hour at which it met, the excitement which prevailed at it, the inscriptions and devices on banners and flags displayed, the language used by the persons assembled, and by those who addressed them, and even what the chairman of this meeting said and did at a previous meeting, convened for a purpose avowedly similar. (*R.* v. *Hunt and others*, 3 B. & & Ald. 566.) But the circumstances must be such as would alarm not foolish or timid persons only, but also persons of reasonable firmness and courage. (*Reg.* v. *Vincent*, 9 C. & P. 91, 109.)

A procession with banners is not necessarily unlawful, even though it result in a breach of the peace; and, where the promoters of a meeting assemble with a lawful purpose, and with no intention of carrying out such purpose in any unlawful manner, the fact that they know that their meeting will be opposed, and have good reason to suppose that a breach of the peace will be committed by their opponents, does not make their meeting unlawful. (*Beatty and others* v. *Gillbanks*, 9 Q. B. D. 308; 51 L. J. M. C. 117; 31 W. R. 275; 47 L. T. 194; 46 J. P. 789; 15 Cox, C. C. 138. But see *O'Kelly* v. *Harvey*, 15 Cox, C. C. 435.)

[*381] (b) *Lawfully convened.*

Not only must the meeting be held "for a lawful purpose," but it must be "lawfully convened." It can hardly be expected that the editor of a newspaper can know exactly how and by whom the meeting was convened. This requirement must, I think, be intended only to meet cases where it is notorious that the meeting is being

convened in defiance of the authorities, or in violation of the Acts against tumultuously petitioning Parliament. (13 Car. II. c. 5; 1 Will. & M. sess. 2, c. 2; and 57 Geo. III. c. 19, s. 23.) Thus, if the Chief Commissioner of Police did not exceed his powers in forbidding any public meeting in Trafalgar Square on November 9th, 1886, a report of any meeting held in spite of his orders would not be privileged. Whether a meeting would be within the section which was summoned for a lawful purpose to meet in Dodd Street, I cannot say; Dodd Street being a public highway, though a *cul de sac*, and therefore held to be an improper place for any meeting.

(e) *The report must be fair and accurate.*

It is not necessary that the report should be *verbatim*; nor is absolute accuracy essential so long as the report is substantially correct. A few slight accidental errors will not destroy the privilege, provided the whole report, as published, produces materially the same effect on the mind of the reader as an absolutely correct report would have done. "It is not to be expected that in discharging this duty of a public journalist he will always be infallible," says Cockburn, C. J., in *Woodgate* v. *Ridout*, 4 F. & F. at p. 217.

(f) *Without Malice.*

This means "without express malice," of course. The privilege created by this section is only qualified, not absolute.

(g) *The Publication of the Matter complained of must be for the Public Benefit.*

This is a most important safeguard. It is not sufficient that a report of the meeting should be for the public benefit; it must be shown that the publication of the very words complained of was for the public benefit. This was clearly pointed out by the Divisional Court in *Pankhurst* v. *Sowler*, 3 Times L. R. 193. In that case, a speaker at a public election meeting thought fit to make a personal attack on a gentleman who was standing for another constituency 200 miles [* 382] off. The whole speech was reported in the *Manchester Courier*. The judge at the trial directed the jury in terms which might be understood as meaning that the only question for the jury was this: Is it for the public benefit that reports of election meetings should be published in newspapers? His lordship did not make it clear to the jury that the Act only protected the newspaper when it was for the public benefit that the *actual libel complained of* should be published broadcast, hence the Court granted a new trial.

Proprietors of papers always contend, as Mr. Sowler did in this very case, that in the hurry of setting-up the type for a daily paper it is practically impossible for the editor to read through the copy; that he ought not to be expected to edit the report; that so long as the meeting is one that ought to be reported, and the report pre-

sented to the public is fairly accurate, nothing more can be required. But this is a view which both the Legislature and the Law Courts steadily refuse to adopt. The editor of a paper must edit the whole paper, or his employers must take the consequence. It clearly is not for the public benefit that every word uttered at a public meeting should be printed and widely disseminated. For instance, if anything seditious, blasphemous, or obscene be uttered at the meeting, that must be omitted from the report. (*Steele* v. *Branman*, L. R. 7 C. P. 261 ; 41 L. J. M. C. 85 ; 20 W. R. 607 ; 26 L. T. 509.) Similarly, if anything defamatory be said of a private citizen, not a public man, the passage must be excised from the report before publication. So, too, if an unfair attack be made on a public man. It cannot be for the public benefit that our newspapers should print and circulate an unfair attack made on a public servant in the heat of the moment at an excited political meeting. A fair attack on his public conduct is no libel (see *ante*, p. 32), and may therefore be published with impunity.

Already, since the decision in *Pankhurst* v. *Sowler* (December 11, 1886), an agitation has commenced for the repeal of this clause of the section. But no reasons which appear to me adequate are assigned for such a change in the law. The consequence of publishing in the papers calumnies uttered at some political or parish meeting may be most injurious to the person calumniated. The original slander may not be actionable *per se*, or the communication may be privileged, so that no action lies against the speaker ; moreover, the meeting may have been thinly attended, and the audience may have known that the speaker was not worthy of credit. But it would be a terrible thing for the person defamed if such words could therefore be printed and published to all the world, and remain in a permanent form recorded against him, without any remedy being permitted him for the injury [* 383] caused by their extended circulation. (See the remarks of Lord Campbell in *Davison* v. *Duncan*, 7 E. & B. 231 ; 26 L. J. Q. B. 106 ; 3 Jur. N. S. 613 ; 5 W. R. 253 ; 28 L. T. (Old S.) 265.)

The existing law appears to me to afford sufficient protection to newspaper proprietors. They ought surely to be liable to a civil action whenever they publish a report defamatory of the plaintiff on a matter in which the public have no interest or concern. No one can desire to encourage that mischievous prying into the private affairs of others, which already disgraces a portion of the London press. If, however, the matter is one of public interest, then all fair *bonâ fide* comments thereon are held not to be libellous, and no action lies, either for their original utterance or for their repetition in the report. And, surely, if unfair and *malâ fide* comments appear in a newspaper, the owner ought to be held liable for the injury thus done by his subordinates. In criminal proceedings, newspaper proprietors can avail themselves of the defences allowed them by Lord Campbell's Act, which appear to me sufficient for the purpose.

(h) *A reasonable Letter must be inserted.*

If the defendant is requested to insert in his paper a reasonable

letter or statement of explanation or contradiction, and refuses to do so, the privilege is lost. The legislature, I presume, regarded such a refusal as cogent evidence of malice. If so, this clause was perhaps not strictly necessary, as the section has already provided that the report must be "published without malice." The presence of this express proviso, however, settles the matter beyond doubt. If there be such a refusal, the case is outside the section, and no question can be left to the jury as to malice or no malice.

Otherwise it is but a poor satisfaction to a plaintiff to allow him to write "a reasonable letter of contradiction." Many who read the report will not read the plaintiff's letter, and those who do probably will not believe it; they will say: "Oh, of course he denies it." It will often be difficult, too, to decide what is and what is not "a *reasonable* letter." And then the speaker at the meeting, or some friend of his, will be sure to write a letter in reply to the plaintiff's, re-asserting the truth of the original charge, and probably adding a judicious selection of fresh accusations, and this letter also the editor will be bound in fairness to insert. And thus will arise a newspaper warfare which will only prolong and aggravate the mischief caused by the report.

3. *No prosecution for newspaper libel without fiat of Attorney-General.*]—No criminal prosecution shall be commenced [*384] against any proprietor, publisher, editor, or any person responsible for the publication of a newspaper for any libel published therein, without the written fiat or allowance of the Director of Public Prosecutions in England or Her Majesty's Attorney-General in Ireland being first had and obtained.

This section does not apply to any criminal information, whether *ex officio* or otherwise. (*R.* v. *Yates*, 11 Q. B. D. 750; 52 L. J. Q. B. 778; 48 J. P. 102; 15 Cox, C. C. 272; *Yates* v. *The Queen* (C. A.), 14 Q. B. D. 648; 54 L. J. Q. B. 258; 33 W. R. 482; 52 L. T. 305; 49 J. P. 436; 15 Cox, C. C. 686.)

The Director of Public Prosecutions has an absolute discretion under this section, to grant or withhold his fiat as he thinks fit. He will not grant it where a civil action will meet all the requirements of the case. The Court has no power to control his discretion; no *mandamus* therefore will issue to compel him to grant his *fiat*. (*Ex parte Hubert Hurter & Son*, 47 J. P. 724; 15 Cox, C. C. 166; 74 Law Times (Newspaper), p. 229.) The *fiat* need not name the actual defendant; it is sufficient if it authorize the prosecution of the proprietor, publisher, or editor of such and such a paper; the Director cannot tell who that may be. (*Reg. pros. Tyler* v. *Bradlaugh* (Nov. 6th, 1882), Times for Nov. 7th, 1882.)

The section, it will be observed, is confined to the proprietors, publishers, and editors of *newspapers*. Possibly, the printer of a newspaper is also included in the phrase "any person responsible for the publication." It would have been well if the section had included books as well as newspapers, so that a master printer, a bookseller, or the owner of a circulating library might no longer be liable to

criminal proceedings for innocently publishing a volume which, as he subsequently learns, contains a libel.

And note that no protection is offered to the actual composer and author of a libel published in a newspaper, not even to a reporter on the staff of the paper.

4. *Inquiry by court of summary jurisdiction as to libel being for public benefit or being true.*]—A court of summary jurisdiction, upon the hearing of a charge against a proprietor, publisher, or editor, or any person responsible for the publication of a newspaper, for a libel published therein, may [* 385] receive evidence as to the publication being for the public benefit, and as to the matters charged in the libel being true, and as to the report being fair and accurate, and published without malice, and as to any matter which under this or any other Act, or otherwise, might be given in evidence by way of defense by the person charged on his trial on indictment, and the court, if of opinion after hearing such evidence that there is a strong or probable presumption that the jury on the trial would acquit the person charged, may dismiss the case.

This section was passed in consequence of the decision in *Reg.* v. *Sir Robert Carden*, 5 Q. B. D. 1; 49 L. J. M. C. 1; 28 W. R. 133; 41 L. T. 504; 14 Cox, C. C. 359; 44 J. P. 119, where it was held that a magistrate before whom a writer is charged with an offence against sect. 5 of the 6 & 7 Vict. c. 96, had no jurisdiction to receive and record evidence of the truth of the libel; as such a defence could only be raised at the trial upon a special plea framed in accordance with that Act. The section only applies to the proprietor, publisher, editor, and printer of a newspaper; hence the actual composer of the libel, and all persons concerned in any libel which has not appeared in a newspaper, are still bound by the former procedure; as to which, see *post*, p. 591.

The section only enables a magistrate to receive and record such evidence as would be admissible, if proper pleas be filed, on the trial of an indictment for the same libel. It does not make evidence admissible to prove the truth of a blasphemous, obscene, or seditious libel. Thus, where upon an application to a magistrate to commit the proprietor of a newspaper for trial for a seditious libel the defendant's counsel tendered evidence of the truth of the libel, and that its publication was for the public benefit, and the magistrate refused to receive the evidence, it was held that such evidence was rightly rejected. (*Ex parte O'Brien*, 12 L. R. Ir. 29; 15 Cox, C. C. 180.)

If the magistrate decide to dismiss the case, the prosecutor may still, under sect. 2 of the Vexatious Indictments Act (22 & 23 Vict. c. 17), which is made applicable to *every* libel by sect. 6 of this Act, require the magistrate to bind him over to prosecute, and the magistrate thereupon is bound to take the prosecutor's recognizance and forward the depositions to the Court in which the indictment will be preferred. But in that case the prosecutor, if unsuccessful,

will have to pay all the defendant's costs. (Sec 30 & 31 Vict. c. 35, s. 2.)

[* 386] **5.** *Provision as to summary conviction for libel.*]—If a court of summary jurisdiction upon the hearing of a charge against a proprietor, publisher, editor, or any person responsible for the publication of a newspaper for a libel published therein is of opinion that though the person charged is shown to have been guilty the libel was of a trivial character, and that the offence may be adequately punished by virtue of the powers of this section, the court shall cause the charge to be reduced into writing and read to the person charged, and then address a question to him to the following effect: "Do you desire to be tried by a jury or do you consent to the case being dealt with summarily?" and, if such person assents to the case being dealt with summarily, the court may summarily convict him and adjudge him to pay a fine not exceeding fifty pounds.

42 & 43 *Vict. c.* 49.]—Section twenty-seven of the Summary Jurisdiction Act, 1879, shall, so far as is consistent with the tenor thereof, apply to every such proceeding as if it were herein enacted and extended to Ireland, and as if the Summary Jurisdiction Acts were therein referred to instead of the Summary Jurisdiction Act, 1848.

If the libel was "of a trivial character," surely no *fiat* would be granted under sect. 3. It must be remembered, however, that the Director of Public Prosecutions only hears one side; the police magistrate hears both sides.

This procedure can only be adopted where the defendant is the proprietor, printer, editor, or publisher of a newspaper within the meaning of this Act. The reporter or other the writer of the libel must be committed for trial in the usual way.

6. 22 & 23 *Vict. c.* 17 *made applicable to all libels.*]—Every libel or alleged libel, and every offence under this Act, shall be deemed to be an offence within and subject to the provisions of the Act of the session of the twenty-second and twenty-third years of the reign of her present Majesty, chapter seventeen, entitled, "An Act to prevent vexatious indictments for certain misdemeanors."

This section applies to all libels, whether published in a newspaper or not. Hence now, if criminal proceedings be taken for a libel contained in a newspaper, the case must be gone into *four* times—once by the director of public prosecutions before he grants his *fiat*; next, before the magistrate, where evidence on both sides will probably be gone into (see sect. 4); then before the grand jury; and, lastly, in open Court, before the petty jury. Surely it would have been far simpler and better to have abolished the remedy by indictment altogether, leaving the person defamed his

civil remedy only in all cases where the libel was not of so serious a character as to call for a criminal information.

As to binding over the prosecutor, see *ante*, p. 385. As to adding to the indictment counts for other libels not before the magistrate, see *R. pros. Tyler* v. *Bradlaugh*, 47 L. T. 477 ; 15 Cox, C. C. 156, *post*, p. 595.

7. *Board of Trade may authorise registration of the names of only a portion of the proprietors of a newspaper.*]—Where, in the opinion of the Board of Trade, inconvenience would arise or be caused in any case from the registry of the names of all the proprietors of the newspaper (either owing to minority, coverture, absence from the United Kingdom, minute subdivision of shares, or other special circumstances), it shall be lawful for the Board of Trade to authorise the registration of such newspaper in the name or names of some one or more responsible "representative proprietors."

This section is out of place. It should have come after sect. 10. (And see *post*, sect. 18.)

Where it is desired to make a return of "representative proprietors" under this section, a statement should be sent to the registrar setting forth the circumstances which render it inconvenient to register the names of all the proprietors, and giving such information as will show that the proposed representatives are well able to meet any claims that may arise for libel or otherwise in connection with the management of the paper.

The Board of Trade very properly require to be satisfied that the person put forward as the "representative proprietor" is "responsible" in every sense of the word.

[*388] 8. *Register of newspaper proprietors to be established.*]—A register of the proprietors of newspapers as defined by this Act shall be established under the superintendence of the registrar.

See the interpretation clause, sect. 1.

9. *Annual returns to be made.*]—It shall be the duty of the printers and publishers for the time being of every newspaper to make or cause to be made to the registry office on or before the thirty-first of July one thousand eight hundred and eighty-one, and thereafter annually in the month of July in every year, a return of the following particulars according to Schedule A. hereunto annexed ; that is to say,

(*a.*) The title of a newspaper :

(*b.*) The names of all the proprietors of such newspaper together with their respective occupations, places of business (if any), and places of residence.

The Act did not come into force till August 27th, 1881 ; although it requires registration before July 31st, 1881. Schedule A. is as follows :—

SCHEDULE A.

Return made pursuant to the Newspaper Libel and Registration Act, 1881.

Title of the Newspaper.	Names of the Proprietors.	Occupations of the Proprietors.	Places of business (if any) of the Proprietors.	Places of Residence of the Proprietors.

The prescribed forms on which the returns are to be made will be sent, either stamped with the requisite fee stamps or unstamped, on application to the Registrar, Companies' Registration Office, Somerset House, London, W.C. No charge is made for the forms; but when stamped forms are required a Postal Order for the amount of the fee must accompany the application.

A separate return will be required for each paper, though the same [*389] proprietor may own more than one. The person presenting the return for registration is required to sign his name and address on the front of it, probably with a view to sect. 12. The printers are required to make the return because their name must be on the paper by the 2 & 3 Vict. c. 12, s. 2.

10. *Penalty for omission to make annual returns.*]—If within the further period of one month after the time hereinbefore appointed for the making of any return as to any newspaper such return be not made, then each printer and publisher of such newspaper shall, on conviction thereof, be liable to a penalty not exceeding twenty-five pounds, and also to be directed by a summary order to make a return within a specified time.

Such an order can be enforced in the manner provided by sect. 34 of the Summary Jurisdiction Act, 1879, that is, by ordering the person in default to pay a sum not exceeding 1*l.* for every day during which he is in default, or to be imprisoned until he make a return.

11. *Power to make return on transfer.*] Any party to a transfer or transmission of or dealing with any share of or interest in any newspaper whereby any person ceases to be a proprietor or any new proprietor is introduced *may* at any time make or cause to be made to the registry office a return according to the Schedule B. hereunto annexed and containing the particulars therein set forth.

Schedule B. is as follows:—

SCHEDULE B.

Return made pursuant to the Newspaper Libel and Registration Act, 1881.

Title of Newspaper.	Names of Persons who cease to be Proprietors.	Names of Persons who become Proprietors.	Occupation of new Proprietors	Places of business (if any) of new Proprietors	Places of Residence of new Proprietors

[*390] It will be observed that this section is permissive merely. The transferee may register his name and address, or not, as he pleases. Hence a plaintiff or prosecutor can never be certain that the registered proprietor is the person liable for the publication complained of. No doubt the presumption would be that the person who was proprietor in July last was proprietor still; but it will be open to him to prove at the trial, after all the costs have been incurred, that since July last he transferred his interest in the paper to some one else. (See *post*, sect. 15.) In a civil case this difficulty may be overcome by administering interrogatories. (See *post*, pp. 551—3.) But it would have been better if the legislature had made the "return according to Schedule B." compulsory on every transfer, and had further enacted that, till such return was registered, the former proprietor should remain liable for everything published in the newspaper.

12. *Penalty for wilful misrepresentation in or omission from return.*]—If any person shall knowingly and wilfully make or cause to be made any return by this Act required or permitted to be made in which shall be inserted or set forth the name of any person as a proprietor of a newspaper who shall not be a proprietor thereof, or in which there shall be any misrepresentation, or from which there shall be any omission in respect of any of the particulars by this Act required to be contained therein whereby such return shall be misleading, or if any proprietor of a newspaper shall knowingly and wilfully permit any such return to be made which shall be misleading as to any of the particulars with reference to his own name, occupation, place of business (if any), or place of residence, then and in every such case every such offender being convicted thereof shall be liable to a penalty not exceeding one hundred pounds.

13. *Registrar to enter returns in register.*]—It shall be the duty of the registrar and he is hereby required forthwith to register

every return made in conformity with the provisions of this Act in a book to be kept for that purpose at the registry office and called "the register of newspaper proprietors," and all persons shall be at liberty to search and inspect the said book from time to time during the [*391] hours of business at the registry office, and any person may require a copy of any entry in or an extract from the book to be certified by the registrar or his deputy for the time being or under the official seal of the registrar.

On payment of one shilling, anyone may inspect both the returns for the present year and also the back returns, at Room No. 7, Somerset House.

14. *Fees payable for registrar's services.*]—There shall be paid in respect of the receipt and entry of returns made in conformity with the provisions of this Act, and for the inspection of the registrar of newspaper proprietors, and for certified copies of any entry therein, and in respect of any other services to be performed by the registrar, such fees (if any) as the Board of Trade with the approval of the Treasury may direct and as they shall deem requisite to defray as well the additional expenses of the registry office caused by the provisions of this Act, as also the further remunerations and salaries (if any) of the registrar, and of any other persons employed under him in the execution of this Act, and such fees shall be dealt with as the Treasury may direct.

The fees which the Board of Trade have, with the approval of the Treasury, directed to be paid are as follows :—

	£	s.	d.
For the registration for the first time of any "representative proprietor" (sect. 7) . . .	1	0	0
On registration in other cases	0	10	0
On the rendering of subsequent returns . .	0	5	0
For inspection	0	1	0
For a copy of a return	0	1	0

and a further fee of fourpence per folio to be charged if the copy exceeds three folios.

For a certificate, a further fee of one shilling is charged for the stamp required by the Inland Revenue Commissioners.

15. *Copies of entries in and extracts from register to be evidence.*]—Every copy of an entry in or extract from the [* 392] register of newspaper proprietors, purporting to be certified by the registrar or his deputy for the time being, or under the official seal of the registrar, shall be received as conclusive evidence of the contents of the said register of newspaper proprietors, so far as the same appear in such copy or extract without proof of the signature thereto or of the seal of office affixed thereto, and every such certified copy or extract shall in all proceedings, civil or criminal, be accepted as sufficient primâ facie evidence of all the matters and things thereby appearing, unless and until the contrary thereof be shown.

This is a very valuable provision, and will greatly facilitate proof

of publication in all cases of newspaper libel. (But see note to sect. 11.)

16. *Recovery of penalties and enforcement of orders.*]—All penalties under this Act may be recovered before a court of summary jurisdiction in manner provided by the Summary Jurisdiction Acts.

Summary orders under this Act may be made by a court of summary jurisdiction, and enforced in manner provided by section thirty-four of the Summary Jurisdiction Act, 1889; and, for the purpose of this Act, that section shall be deemed to apply to Ireland in the same manner as if it were re-enacted in this Act.

17. *Definitions.*]—The expression "a court of summary jurisdiction" has in England the meanings assigned to it by the Summary Jurisdiction Act, 1879; and in Ireland means any justice or justices of the peace, stipendiary or other magistrate or magistrates, having jurisdiction under the Summary Jurisdiction Acts.

The expression "Summary Jurisdiction Acts," has as regards England the meanings assigned to it by the Summary Jurisdiction Act, 1879; and as regards Ireland, means within the police district of Dublin metropolis the Acts regulating the powers and duties of justices of the peace for such district, or of the police of that district, and [* 393] elsewhere in Ireland the Petty Sessions (Ireland) Act, 1851, and any Act amending the same.

By sect. 50 of the Summary Jurisdiction Act, 1879, the expression, "a Court of Summary Jurisdiction," is defined to mean "any justice or justices of the peace or other magistrate, by whatever name called, to whom jurisdiction is given by, or who is or are authorized to act under, the Summary Jurisdiction Acts, or any of such Acts."

By the same section, the expression "Summary Jurisdiction Acts" is defined to mean the Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), and the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49) and any Act, past or future, amending either of them.

18. *Provisions as to registration of newspaper proprietors not to apply to newspaper belonging to a joint stock company.*]—The provisions as to the registration of newspaper proprietors contained in this Act shall not apply to the case of any newspaper which belongs to a joint stock company duly incorporated under and subject to the provisions of the Companies Acts, 1862 to 1879.

This is a mistaken and mischievous provision. Many newspapers now are published by limited liability companies, with names that suggest no connection between the company and the paper. For instance the *Graphic* is published by "H. R. Baines & Co., Limited." Assuming that it were possible that a libel should appear in the *Graphic*, how could the person libelled discover whom to make defendant? Owing to this section there would be no entry at all at Somerset House to assist him.

19. *Act not to extend to Scotland.*]—This Act shall not extend to Scotland.

The law of Scotland was said to be less stringent on the subject than that of England or Ireland.

20. *Short title.*]—This Act may for all purposes be cited as the Newspaper Libel and Registration Act, 1881.

The Schedules to which this Act refers :

SCHEDULE A.

[Set out in the note to sect. 9, *ante*, p. 388.]

SCHEDULE B.

[Set out in the note to sect. 11, *ante*, p. 389.]

[*394] CHAPTER XIV.

THE LAW OF PERSONS IN BOTH CIVIL AND CRIMINAL CASES.

We have hitherto dealt with the plaintiff and defendant as individuals under no disability, who sue and are sued singly and in their own right. I propose in this chapter to examine the rights and liabilities arising from personal disability or special personal relations with others, both in civil and criminal cases.

It will be convenient to divide this chapter into the following heads:—

1. Husband and Wife.
2. Infants.
3. Lunatics.
4. Bankrupts.
5. Receivers.
6. Executors and Administrators.
7. Aliens.
8. Master and Servant; Principal and agent.
9. Corporations and companies.
10. Partners.
11. Other Joint Plaintiffs.
12. Joint defendants.

1. *Husband and Wife.*

Whenever words actionable *per se* are spoken of a married woman, she may sue alone, or she may join [*395] her husband as co-plaintiff, in which case he will be entitled to recover in the same action for any special damage that may have occurred to him. When the words are not actionable *per se*, she may sue, provided she can show that some special damage has followed from the words to *her*. That special damage has accrued to her husband in consequence of such words will not avail her; he alone can sue for such damage, although it is *her* reputation that has been assailed.

Hence, if words not actionable *per se* be spoken of a married woman and damage ensue to the husband, none to her, she cannot sue, but he can. The damage to him is in fact the sole cause of action.

This right of the husband to sue for words defamatory of his wife is somewhat anomalous, for *his* reputation is in no way assailed; and though he has sustained damage, is it not *damnum sine injuria*? Generally speaking, if words defamatory of A., but not actionable in themselves, produce damage only to B., neither A. nor B. can sue. But the reputation of a husband is so intimately connected

with that of his wife, that he has always been allowed to sue whenever he has received damage, just as though the words had been spoken of himself.

That this is law, is clearly laid down in Siderfin, 346, under the year 1667 :—"Nota, si parols queux de eux m̃ ne sont Actionable mes solement in respect del collateral dams. sont ple. (parlés) del feme covert, Le Baron sole port L'action, et si le feme soit joyn ove luy le Judgment serra pur ceo arrest, coment soit apres verdict." (And see *Harwood et Hardwick et ux.* (1668), 2 Keble, 387 ; *Coleman et ux.* v. *Harcourt* (1664), 1 Levinz, 140 ; *Grove et ux.* v. *Hart* (1752). Sayer, 33 ; B. N. P. 7.) In the case of *Riding* v. *Smith*, 1 Ex. D. 91 ; 45 L. J. Ex. 281 ; 24 W. R. 487; 34 L. T. 500, the wife's name was struck off the record by the judge at the trial, and the husband recovered for the damage to his business caused by words not actionable *per se*, spoken of his wife ; though there it is true the Court bases its judgment on the fact that Mrs. Riding helped her husband in the shop, and was therefore his servant or assistant as well as his wife.

By the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 1, sub-s. (2), a married woman is now [* 396] capable "of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a *feme sole*, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her ; and any damages or costs recovered by her in any such action or proceeding shall be her separate property ; and any damages or cost recovered against her in any such action or proceeding shall be payable out of her separate property, and not otherwise." A married woman, therefore, may now sue for libel or slander without her husband or any next friend ; and she cannot be ordered to give security for the costs of the action, even although she have at the time of action no separate estate, and there be nothing upon which, if she fails, the defendant can issue available execution. (*In re Isaac, Jacob* v. *Isaac* (C. A.), 30 Ch. D. 418 ; 54 L. J. Ch. 1136 ; 33 W. R. 845 ; 53 L. T. 478 ; *Threlfall* v. *Wilson*, 8 P. D. 18 ; 48 L. T. 238 ; *Severance Civil Service Supply Association*, 48 L. T. 485.) This section enables a married woman to sue alone for a tort committed against her before the Act came into operation. (*Weldon* v. *Winslow* (C. A.), 13 Q. B. D. 784 ; 53 L. J. Q. B. 528 ; 33 W. R. 219 ; 51 L. T. 643.) And as she could not sue alone before the commencement of the Act (January 1st, 1883), the Statute of Limitations does not commence to run against her till that date. (*Weldon* v. *Neal*, 32 W. R. 828.)

Formerly a married woman was always bound to join her husband as co-plaintiff, otherwise the defendant might plead in abatement. But the action was still regarded as solely hers. If she died, it abated ; if he died, the action survived to her and she continued it as sole plaintiff. No damages could be recovered in such an action for any pecuniary loss suffered by the husband ; if the

words were not actionable *per se*, and the female plaintiff could show no damage to herself, they were non-suited.

The husband was formerly obliged to bring a separate action for any damage he had sustained. But by the Common Law Procedure [*397] Act, 1852, s. 40, he was allowed to add claims in his own right whenever he was necessarily made a co-plaintiff in any action brought for an injury done to his wife ; and it was provided that on the death of either party the action should not abate so far as the causes of action belonging to the survivor were concerned. And now, by Order XVIII. r. 4, "Claims by or against husband and wife may be joined with claims by or against either of them separately."

Married women still, as a rule, adopt the old common law method, and join their husbands as co-plaintiff. And there is this practical convenience in so doing, that thus all damages sustained by either can be recovered in one action. And there is also a twofold chance of proving special damage. In all cases of the class of *Allsop* v. *Allsop*, 5 H. & N. 534 ; 29 L. J. Ex. 315, *ante*, p. 336, it will clearly be prudent for the pleader to make a separate claim for damages for the husband. For I apprehend that it is clear law that a wife suing alone under the Act of 1882, cannot recover for any special damage which would have been excluded in an action brought at common law by herself and her husband. The damages recovered in such an action are to be her separate property ; she cannot, therefore, recover for any loss which her husband has suffered. "The Act does not destroy the husband's right, but only relieves the woman from incapacity." (Per Bowen, L. J., in *Weldon* v. *Winslow* (C. A.), 13 Q. B. D. 788 ; 53 L. J. Q. B. 528 ; 33 W. R. 219 ; 51 L. T. 643.)

By sect. 12 of the same Act, "Every woman, whether married before or after this Act, shall have in her own name against all persons whomsoever, including her husband, the same civil remedies, and also (subject, as regards her husband, to the proviso hereinafter contained) the same remedies and redress by way of criminal proceedings, for the protection and security of her own separate property, as if such property belonged to her as a *feme sole*, but, except as aforesaid, no husband or wife shall be entitled to sue the other for a tort." This section does not enable a married woman to take criminal proceedings against her husband for a personal libel upon herself. (*The Queen* v. *Lord Mayor of London and Vance*, 16 Q. B. D. 772 ; 55 L. J. M. C. 118 ; 34 W. R. 544; 54 L. T. 761; 50 J. P. 614; 16 Cox, C. C. 81.)

[*398] In New York and Pennsylvania a married woman has for many years been enabled by special statute to sue for libel or slander without joining her husband ; but even in those States she cannot sue her husband for defaming her. (*Freethy* v. *Freethy*, 42 Barb. (N. Y.) 641; *Tibbs* v. *Brown*, 2 Grant's Cas. (Penn.) 39.) It is submitted, however, that if in England a married woman carried on a separate trade or profession, and her husband libelled or slandered

her in the way of such trade or profession, she could sue him under sect. 12; such an action was held by Brett, J., to be "a remedy for the protection and security" of her seperate property within sect. 11 of the Act of 1870, and in the present sect. 12 the same words are used. (*Summers* v. *City Bank*, L. R. 9 C. P. 580; 43 L. J. C. P. 261.) But he cannot in any case, not even after they are divorced, sue her for defamatory words published by her during coverture. (*Phillips* v. *Barnet*, 1. Q. B. D. 436; 45 L. J. Q. B. 277; 24 W. R. 345; 34 L. T. 177.)

If the words be spoken of the woman before marriage, the husband's name may still be joined on the writ; if she marry pending action, the husband may be made a party under Order XVII. r. 4, though this is not necessary (r. 1). The right of action survives to the wife on her husband's death, whether he was a party to the action or not; the widow continues sole plaintiff and the action does not abate. If, however, the wife dies before final judgment, the action must cease; it cannot be continued by her husband either *jure mariti*, or as her administrator.

If a married woman fail in an action of libel or slander, she may be condemned in costs, although her husband was joined as a co-plaintiff. (*Newton and wife* v. *Boodle and others*, 4 C. B. 359; 18 L. J. C. P. 73.)

Illustrations.

Where words actionable *per se* were spoken of a married woman, she was allowed to recover only 20*s.* damages; all the special damage which she proved at the trial was held to have accrued to her husband, and not to her; he ought therefore to have sued for it in a separate action. He could now claim such damage in his wife's action, if joined as a co-plaintiff.

Dengate and wife v. *Gardiner*, M. & W. 5; 2 Jur. 470.

[* 399] Where a married woman lived in service apart from her husband, maintaining herself, and was dismissed in consequence of a libellous letter sent to her master, it was held that the husband could sue; for his was the special damage.

Coward v. *Wellington* (1836), 7 C. & P. 531.

In such a case, had the cause of her dismissal been slanderous words not actionable *per se*, the wife could not (before the Married Women's Property Act, 1870, at all events) have sued. She would have been held to have suffered no damage at all, her personal property belonging entirely to her husband. Per Lord Campbell in

Lynch v. *Knight and wife*, 9 H. L. C. 589; 8 Jur. N. S. 724; 5 L. T. 291.

Action by husband and wife, who kept a victualling-house, against the defendant for saying to the wife, "Thou art a bawd to thy own daughter," whereby J. S. that used to come to the house forebore, &c., to the damage of *both*. After a verdict for the plaintiffs, judgment was stayed "because the words are not actionable, except in respect of the special loss, which is the husband's only."

Coleman and wife v. *Harcourt* (1664), 1 Lev. 140.

The female plaintiff lived separate from her husband and kept a boarding-house. The defendant spoke words imputing to her insolvency, adultery, and prostitution; some of her boarders left her in consequence, and certain tradesmen refused her credit. After verdict for the plaintiff, judgment was arrested, on the ground that the husband should have sued alone, for the words were actionable only by reason of the damage to the business and such damage was solely his.

Saville et ux. v. *Sweeney*, 4 B. & Adol. 514; 1 N. & M. 254.

And so in America where a married woman was living apart from her husband under articles of separation, wherein the husband had covenanted that she might use his name in suing for any injury to her person or character, and the wife brought an action for slander in the joint names of her husband and herself; the defendant induced the husband to execute a deed releasing the cause of action, and pleaded the release in bar of the wife's action, and the Court was compelled to hold this deed a good answer to the action.

Beach et ux. v. *Beach*, 2 Hill (N. Y.), 260.

Where the libel imputed that the plaintiff, a married man, kept a gaming-house, and that his wife was a woman of notoriously bad character, and the wife fell ill and died in consequence, evidence of such damage was excluded in an action brought by the surviving husband.

Guy v. *Gregory*, 9 C. & P. 584.

And see *Wilson* v. *Goit*, 3 Smith (17 N. Y. R.), 445, *ante*, p. 302.

Words directly defamatory of the wife may also be defamatory of the husband, who may therefore sue alone. Thus, where defendant said to plaintiff's wife: "You are a nuisance to live beside of. You are a bawd; and your house is no better than a bawdy-house," it was held unnecessary to make the wife a party to the action, although the husband proved no special damage. For had the charge been true, the plaintiff might have been indicted as well as his wife.

Huckle v. *Reynolds*, 7 C. B. N. S. 114.

And see *Bush* v. *Sommer*, 20 Pennsylvania St. R. 159.

Where the defendant said to the plaintiff, an innkeeper, "Thy house is in[* 400]fected with the pox, and thy wife was laid of the pox," it was held that the husband could sue; for even if small-pox only was meant, the words were still actionable, "for it is a discredit to the plaintiff, and guests would not resort hither." Damages £50.

Levet's Case, Cro. Eliz. 289.

"If an innkeeper's wife be called '*a cheat*,' and the house lose the trade, the husband has an injury by the words spoken of his wife." Per Wythens, J., in

Baldwin v. *Flower* (1688), 3 Mod. 120.

Grove et ux. Hart (1752), B. N. P. 7; Sayer, 33.

A husband is liable for all libels published or slanders uttered by his wife during coverture. "They are the torts of her husband, and therefore she creates as against her husband a liability." (Per Jessel, M. R., in *Wainford* v. *Heyl*, L. R. 20 Eq. at p. 325; 44 L. J. Ch. 567; 23 W. R. 848; 33 L. T. 155.) And there is nothing in any provision of the Married Women's Property Act, 1882, removing or affecting this liability. (*Seroka and wife* v. *Kattenburg and wife*, 17 Q. B. D. 177; 55 L. J. Q. B. 375; 34 W. R. 542; 54 L. T. 649.)

Hence, although a plaintiff may now sue the wife alone, if he wishes, for any libel or slander published by her (*ante*, p. 396), it will generally be advisable for him to sue the husband as well. For if he sue the wife alone, he can only obtain execution against such separate estate as she is not restrained from anticipating, unless by reason of sect. 19 of the Act of 1882 any portion of such property shall be liable to execution notwithstanding such restraint. (*Bursill* v. *Tanner*, 13 Q. B. D. 691; 32 W. R. 827; 50 L. T. 589; *Turnbull* v. *Forman*, 15 Q. B. D. 234; 54 L. J. Q. B. 489; 33 W. R. 768; 53 L. T. 128.) And it might be questioned whether any separate estate which a married woman acquired after the publication complained of, and before judgment, would be liable to execution; though it would probably be held that it was. Moreover, the judgment against the wife, if sued alone, will release the husband from all liability for the same tort; the plaintiff cannot proceed

against him in case the separate property prove insufficient; whereas, if he join both husband and wife as defendants on his writ, he can obtain judgment against the wife's separate estate, and also against the husband for the residue of damages and costs not recovered out of her separate estate.

When husband and wife are both made defendants, they must both [* 401] be served, unless the Court or a judge shall otherwise order. (Ord. IX. r. 3.) And although in the case of a wife's ante-nuptial tort there is an express provision that, as between her and her husband, her separate estate shall be deemed to be primarily liable for damages and costs recovered in such an action, there is no such provision in the case of a post-nuptial tort. Hence, I presume, the ordinary rule applies; and a husband who has had to pay damages out of his own pocket for his wife's words will have no remedy over against her separate estate. But the plaintiff may, of course, if he will, enforce his joint judgment against the separate property of the wife, and not against the husband. (*Ferguson* v. *Clayworth and wife*, 6 Q. B. 269; 13 L. J. Q. B. 329; 8 Jur. 709; 2 D. & L. 165; *Ivens* v. *Butler and wife*, 7 E. & B. 159; 26 L. J. Q. B. 145; 3 Jur. N. S. 334.) It is not necessary for this purpose that the trustees of her marriage settlement should be made parties to the action. (*Davies* v. *Jenkins*, 6 Ch. D. 728; 46 L. J. Ch. 761; 26 W. R. 260.) An inquiry will be directed to ascertain of what her separate estate consists, and in whom it is vested, as in *Collett* v. *Dickenson*, 11 Ch. D. 687; 40 L. T. 394; and on such inquiry the solicitor to the trustees will be bound to state their names, and to produce the deed of settlement. (*Bursill* v. *Tanner* (C. A.), 16 Q. B. D. 1; 55 L. J. Q. B. 53; 53 L. T. 445.) So, too, though husband and wife be both sued, the wife, having general separate estate, may be condemned in costs. (*Morris* v. *Freeman and wife*, 3 P. D. 65; 47 L. J. P. D. & A. 79; 27 W. R. 62; 39 L. T. 125.)

It is submitted that a married woman cannot be sued alone for any tort committed by her during coverture, prior to January 1st, 1883; as, prior to the commencement of the Act of 1882, she was not capable of rendering herself liable for her own tort. The former Married Women's Property Acts did not affect her position as defendant. (*Hancocks & Co. Madame Demeric-Lablache*, 3 C. P. D. 197; 47 L. J. C. P. 514; 26 W. R. 402; 38 L. T. 753.)

For all libels published, or slanders uttered by the wife before coverture, her husband was at common law liable to the full extent. But now his liability is restricted in this respect. By the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 13, "A woman, after her marriage, shall continue to be liable in respect and to the extent of her separate property for all wrongs committed by [*402] her before her marriage, and she may be sued for any liability in damages or otherwise in respect of any such wrong, and all sums recovered against her in respect thereof, or for any costs relating thereto, shall be payable out of her separate property; and, as between her and her husband, unless there be any contract between them to the contrary, her separate property shall be deemed to be

primarily liable for all such wrongs, and for all damages or costs recovered in respect thereof : Provided always, that nothing in this Act shall operate to increase or diminish the liability of any woman married before the commencement of this Act for any such wrong, except as to any separate property to which she may become entitled by virtue of this Act, and to which she would not have been entitled for her separate use under the Acts hereby repealed or otherwise, if this Act had not passed."

By sect. 14, "A husband shall be liable for all wrongs committed by his wife, before marriage, to the extent of all property whatsoever belonging to her which he shall have acquired or become entitled to from or through his wife, after deducting therefrom any payments made by him, and any sums for which judgment may have been bonâ fide recovered against him in any proceeding at law, in respect of any debts, contracts, or wrongs for or in respect of which his wife was liable before her marriage as aforesaid, but he shall not be liable for the same any further or otherwise ; and any court in which a husband shall be sued for any such debt (*sic*) shall have power to direct any inquiry or proceedings which it may think proper for the purpose of ascertaining the nature, amount, or value of such property. Provided always, that nothing in this Act contained shall operate to increase or diminish the liability of any husband married before the commencement of this Act for or in respect of any such liability of his wife as aforesaid."

By sect. 15, "A husband and wife may be jointly sued in respect of any liability incurred by the wife before mar[*403]riage as aforesaid, if the plaintiff in the action shall seek to establish his claim, either wholly or in part, against both of them; and if in any such action, or in any action brought in respect of any such liability against the husband, it is not found that the husband is liable in respect of any property of the wife so acquired by him, or to which he shall have become so entitled as aforesaid, he shall have judgment for his costs of defence, whatever may be the result of the action against the wife if jointly sued with him ; and in any such action against husband and wife jointly, if it appears that the husband is liable for the damages recovered, or any part threrof, the judgment to the extent of the amount for which the husband is liable shall be a joint judgment against the husband personally and against the wife as to her separate property; and as to the residue, if any, of such damages, the judgment shall be a separate judgment against the wife as to her separate property only."

Note, that these sections do not apply to any husband married before January 1st, 1883. A husband married before July 30th, 1874, remains liable to the full extent as at common law ; though of course he is protected by the Statute of Limitations. Any husband married between July 30th, 1874, and January 1st, 1883, can claim the benefit of sects. 2 and 5 of the act of 1878 (37 & 38 Vict. c. 50), which limit his liability for torts committed by his wife *dum sola* to the extent merely of the property which has vested in him

by reason of the marriage. Such a husband should be made a joint defendant, and must plead specially that no property came to him with his wife, or, if any did vest in him, that he has been compelled to devote the whole or some portion of it to paying other creditors of hers.

If the husband dies before judgment the action continues against the widow; if, however, the wife dies in the lifetime of her husband before judgment, the action immediately abates, whether it was for a post-nuptial or an ante-nuptial tort (*Bell and another* v. *Stocker*, 10 Q. B. D. 129; 52 L. J. Q. B. 49; 47 L. T. 624), unless he himself [*404] joined in or authorized it. If they be divorced, the wife must be sued alone; the husband is released from all liability, even though the words complained of were published before the divorce. (*Capel* v. *Powell and another*, 11 C.B.N.S. 743; 34 L.J.C.P. 161; 10 Jur. N. S. 1255; 13 W. R. 159; 11 L. T. 421.) So, if the wife has before action obtained a judicial separation (20 & 21 Vict. c. 85, ss. 25, 26), or a protection order still in force (sect. 21). But if the husband and wife voluntarily live apart under a separation deed, the common law rule prevails; the husband is liable for her misconduct, and may be joined as a defendant. (*Head* v. *Briscoe et ux.*, 5 C. & P. 485; 2 L. J. C. P. 101.)

A married woman will be held criminally liable for a libel she has published. (*R* v. *Mary Carlile*, 3 B. & Ald. 167. Her coverture will, it seems, be no defence to an indictment for a misdemeanour. (*R.* v. *Ingram*, 1 Salk. 384; *R.* v. *Cruse and Mary his wife*, 2 Moo. C. C. 53; 8 C. P. 541.)

Illustrations.

Plaintiff sued Orchard and his wife for slanderous words; the jury found that Orchard had spoken the words, but not Mrs. Orchard. Judgment against the husband It was moved in arrest of judgment that the speaking of the words could not be a joint act, and that if the husband alone uttered them, the wife ought never to have been made a party to the action. But it was held that this defect was cured by the verdict, and that the plaintiff was entitled to retain his judgment.

Burcher v. *Orchard et ux.* (1652), Style, 349.

But see *Swithin et ux.* v. *Vincent et ux.* (1764), 2 Wils. 227.

Mrs. Harwood slandered Mrs. White; wherefore White and wife sued Harwood and wife. Pending action, Harwood died, and his widow remarried. The Court was very much puzzled, and gave no judgment, apparently, though inclining to think that the writ abated. [I think it would now depend on whether the widow had any property at the date of her second marriage; if so, the second husband could be added as a co-defendant, or the action might proceed against her alone; if not, it would certainly be but little use continuing it.]

White et ux. v. *Harwood et ux.* (1648), Style, 138; Vin. Abr. "Baron and Feme," A. a.

Mrs. Clayworth slandered plaintiff, who recovered 40s. damages and costs against her and her husband, and took her in execution under a *ca. sa.* The [*405] Court refused to discharge her out of the custody of the sheriff without the clearest proof that she had no separate property.

Ferguson v. *Clayworth and wife*, 6 Q. B. 269; 13 L. J. Q. B. 329; 8 Jur. 709; 2 D. & L. 165.

But now see *Draycott* v. *Harrison*, 17 Q. B. D. 147; 34 W. R. 546.

2. *Infants.*

An infant may bring an action of libel or slander. He may trade, and may therefore have an action of slander for words which would damage him in his trade. (*Wild* v. *Tomkinson*, 5 L. J. K. B. 265.) As to a charge of crime, see *ante*, p. 63. An infant sues by his next friend, who is personally liable for the costs of the suit (*Caley* v. *Caley*, 25 W. R. 528) ; but security for costs will not as a rule be required from him, lest the infant should lose his rights altogether. An infant defends by a guardian *ad litem*. (See Order XVI. rr. 18, 19, 21 ; OrderXIII. r. 1 ; and Order LV. r. 27.) A guardian *ad litem* is not liable for costs, unless he has been guilty of gross misconduct.

The infancy of the defendant is no defence to an action of libel or slander. In *Defries* v. *Davis*, 7 C. & P. 112 ; 3 Dowl. 629, the defendant, a lad of fifteen, was imprisoned for default in payment of damages and costs for a slander.

An infant will also be criminally liable for any libel, if he be above the age of fourteen. If he be under fourteen, but above seven, he might possibly be found guilty of a libel, if evidence were given of a disposition prematurely wicked. But more than the proof of malice ordinarily given in cases of privilege would probably be acquired.

That an infant has been defamed gives his parents no right of action, unless in some very exceptional case it deprives the parent of services which the infant formerly rendered, in which case an action on the case may lie for the special damage thus wrongfully inflicted, provided it be the natural and probable consequence of the defendant's words. (See *post*, Master and Servant, p. 409.) A child will be held to be the servant of its parents, provided it is old enough to be capable of rendering them any act of service. (*Dixon* v. *Bell*, 5 Maule & S. [*406] 198 ; *Hall* v. *Hollander*, 4 B. & C. 660 ; 7 D. & R. 133 ; *Evans* v. *Walton*, L. R. 2 C. P. 615 ; 15 W. R. 1062.)

3. *Lunatics.*

It is almost inconceivable that an admitted lunatic should bring an action of libel or slander. But, should such an event happen, he ought to sue by his next friend, if he has not yet been found of unsound mind by inquisition ; if he has been, then by his committee, who before commencing the action must obtain the sanction of the Lords Justices and of the Master in Lunacy in the proper way.

Lunatics defend an action by their committee, if one be appointed, and if he has no adverse interest ; in other cases by a guardian *ad litem*. Lunacy is in England, it is said, no defence to an action for slander or libel. (Per Kelly, C. B., in *Mordaunt* v. *Mordaunt*, 39 L. J. Prob. & Matr. 59.) In America, however, insanity at the time of speaking the words is considered a defence, " where the derangement is great and notorious, so that the speaking the words could produce no effect on the hearers," because then " it is manifest no

damage would be incurred." But where the degree of insanity is slight, or not uniform, there evidence of it is only admissible in mitigation of damages. (*Dickinson* v. *Barber*, 9 Tyng (Mass.), 218 ; *Yeates et ux.* v. *Reed et ux.*, 4 Blackford (Indiana), 463 ; *Horner* v. *Marshall's Administratrix*, 5 Munford (Virginia), 466 ; *Gates* v. *Meredith*, 7 Ind. 440.)

A lunatic cannot be held criminally liable for a libel published under the influence of mental derangement ; but the onus of proving this defence lies on the accused.

Bankrupts.

An undischarged bankrupt may sue for and recover damages for a personal wrong, such as libel or slander, nor will such damages pass to his trustee under sect. 15 of the Bankruptcy Act, 1869. (*Dowling* v. *Browne* (1854), 4 Ir. [*407] C. L. R. 265 ; *Ex parte Vine, In re Wilson*, 8 Ch. D. 364 ; 26 W. R. 582 ; 38 L. T. 730.) The right of action is not assignable (*Benson* v. *Flower*, Sir Wm. Jones, 215) ; and the trustee cannot interfere. Hence the defendant is not entitled to security for costs (*Andrews* v. *Marris and another*, 7 Dowl. 712 ; *Stead* v. *Williams and others*, 5 C. B. 528) ; unless possibly where the plaintiff becomes bankrupt pending action. (*Brocklebank & Co.* v. *King's Lynn Steamship Co.*, 3 C. P. D. 365 ; 47 L. J. C. P. 321 ; 38 L. T. 489 ; *In re Carta Para Mining Co.*, 19 Ch. D. 457 ; 51 L. J. Ch. 191 ; 46 L. T. 406.) Neither the bankruptcy of the plaintiff nor that of the defendant is any defence to the action. If a plaintiff likes to sue an insolvent defendant for unliquidated damages, he may do so.

5. *Receivers.*

If receivers appointed by the Court in an administration suit to carry on a gazette, publish a libel therein, they are of course personally liable for damages and costs. The damages, it would seem, may be paid out of the estate, but not the costs ; those the receivers must pay out of their own pocket. (*Stubbs* v. *Marsh*, 15 L. T. 312.) So in America. (*Marten* v. *Van Schaick*, 4 Paige, 479.)

6. *Executors and Administrators.*

The maxim *actio personalis cum personâ moritur* applies to all actions of libel and slander. If, therefore, either party die before verdict, the action is at an end. "There shall be no abatement by reason of the death of either party between the verdict or finding of the issues of fact and the judgment, but judgment may in such case be entered, notwithstanding the death." (Order XVII. r. 1.) But if interlocutory judgment be signed and a writ of inquiry issue, and then plaintiff die, final judgment cannot be entered. (8 & 9 Will. III. c. 11, s. 6 ; *Ireland* v. *Champ* [*408] *neys*, 4 Taunt. 884.) If, however, final judgment has once been entered in the plaintiff's favour, and then plaintiff dies and defendant appeals, the action will

not abate; but the executors or administrators of the late plaintiff may appear as respondents to the appeal. (*Twycross* v. *Grant and others* (C. A.) 4 C. P. D. 40; 47 L. J. Q. B. 676; 27 W. R. 87; 39 L. T. 618.) So in America. (*Sandford* v. *Bennett*, 24 N. Y. 20.) So, if either party die after final judgment, execution can issue under Order XLII. r. 23.

An action in the nature of slander of title survives to the plaintiff's executor to the extent that damage can be shown to the plaintiff's estate. (*Hatchard* v. *Meye and others*, 3 Times L. R, 546; Weekly Notes, 1887, p. 80; 51 J. P. 277.)

7. *Aliens.*

An alien friend residing abroad may sue in England for a libel or slander published of him in England. (*Pisani* v. *Lawson*, 6 Bing, N. C. 90; 5 Scott, 418.) The place where the words were spoken or published is a test of jurisdiction; not the domicile of the plaintiff or the defendant. But any plaintiff whose ordinary place of residence is not in the British Isles may be ordered to give security for costs, unless he either has real property within jurisdiction available in execution, or is co-plaintiff with others resident in England. (Order LXV. r. 6, a; 31 & 32 Vict. c. 54, s. 5; *Massey* v. *Allen*, 12 Ch. D. 807; 48 L. J. Ch. 692; 28 W. R. 243; 41 L. T. 788.)

Every foreigner within jurisdiction, for however short a time, owes the Queen allegiance during his stay, and is subject to our laws. He will be liable, therefore, both civilly and criminally, for every libel published within the jurisdiction of the English Courts; he will also be civilly liable for every slander uttered within jurisdiction. If, however, he has left England before the writ is issued, the plaintiff will have great difficulty, under the new [*409] Order XI., in obtaining leave to issue a writ. If such leave be granted, he must serve on the defendant notice that the writ has been issued, and not the writ itself. (Order XI. r. 6.) See *post*, p. 518.

Illustrations.

A French refugee in England wrote a stilted poem about the apotheosis of Napoleon Buonaparte, then first consul of the French Republic, suggesting that it would be an heroic deed to assassinate him. He was held amenable to the English criminal law, although the libel was purely political, affected no one in the British Isles, and attacked the man who was England's greatest enemy at the time. The jury found him guilty; but war broke out again between England and France soon afterwards, and no sentence was ever passed.

R. v. *Jean Peltier*, 28 Howell's St. Tr. 617.

The defendant out of jurisdiction made a statement in the nature of slander of title to the plaintiff's ship. The Court refused to allow the writ to be served, although the ship was at the time within jurisdiction.

Casey v. *Arnott*, 2 C. P. D. 24; 46 L. J. C. P. 3; 25 W. R. 46; 35 L. T. 424.

Where words spoken out of the jurisdiction indirectly caused special damage to the plaintiff within the jurisdiction, the Court refused leave to issue a writ to be served out of jurisdiction, on the ground that such special damage was not an "act done" within jurisdiction, within the meaning of the former Order XI. r. 1.

Bree v. *Marescaux* (C. A.), 7 Q. B. D. 434; 50 L. J. Q. B. 676; 29 W. R. 858; 44 L. T. 644, 765.
But now see *Tozier and wife* v. *Hawkins* (C. A.), 15 Q. B. D. 650, 680; 55 L. J. Q. B. 152; 34 W. R. 223.

8. *Master and Servant—Principal and Agent.*

If a servant or apprentice be libelled or slandered he can of course sue in his own right. In some cases his master also can sue in an action on the case, if the words have directly caused him pecuniary loss; *e. g.*, if the servant has been arrested and the master deprived of his services in consequence of the defendant's words; or if in any other way the natural consequence of the words spoken has been to injure the master in the way of his trade. And this [*410] appears to be the law whether the words be actionable *per se* or not.

Illustrations.

If defendant threaten plaintiff's workmen, so that they dare not go on with their work, and the plaintiff in consequence loses the profit he would have made on the sale of his goods, an action lies.
Garret v. *Taylor* (1621), Cro. Jac. 567; 1 Roll. Abr. 108.
Springhead Spinning Co. v. *Riley*, L. R. 6 Eq. 551; 37 L. J. Ch. 889; 16 W. R. 1138; 19 L. T. 64.

"Supposing the statement made not to be slander, but something else calculated to injure the shopkeeper in the way of his trade, as for instance a statement that one of his shopmen was suffering from an infectious disease, such as scarlet-fever, this would operate to prevent people coming to the shop; and whether it be slander or some other statement which has the effect I have mentioned, an action can, in my opinion, be maintained on the ground that it is a statement made to the public which would have the effect of preventing their resorting to the shop and buying goods of the owner." Per Kelly, C. B., in *Riding* v. *Smith*, 1 Ex. D. 94.

Mrs. Riding assisted her husband in his shop; words not actionable *per se* were spoken of her which by natural consequence injured the trade of the shop. Mrs. Riding sued the speaker, joining her husband for conformity. At the trial it became clear that the only special damage was to the husband. Thereupon the plaintiff's counsel applied to have the wife's name struck off the record. The learned judge made the required amendment, and the action then became an action by a master for injury to his business caused by slander of his assistant in that business. *Held*, that the action lay.
Riding v. *Smith*, 1 Ex. D. 91; 45 L. J. Ex. 281; 24 W. R. 487; 34 L. T. 500.

If any agent or servant be in any way concerned in writing, printing, publishing, or selling a libel, he will be both civilly and criminally liable. If a clerk or servant copy a libel, and deliver the copy he has made to a third person, he will be liable as a publisher. That his master or employer ordered him to do so, will be no defence. (Per Wood, B., in *Maloney* v. *Bartley*, 3 Camp. 210.) "For the warrant of no man, not even of the king himself, can excuse the doing of an illegal act; for although the commanders are trespassers, so are also the persons who did the fact." (*Per cur.* in *Sands, qui tam, &c.* v. *Child and others* (1693), 3 Lev. 352.) The agent or servant cannot recover any contribution from his employer (*Merryweather* [*411] v. *Nixan*, 2 Sm. L. Cases (8th edn.) 546; 8 T. R. 186): and any previous promise to indemnify him against the con-

sequences of the publication, or against the costs of an action brought for the libel, will be void. (*Shackell* v. *Rosier*, 2 Bing. N. C. 634 ; 3 Sc. 59.)

But it will be a defence if the agent or servant can satisfy the jury that he never read the paper he delivered, and was wholly unaware that it was a libel ; *e. g.*, where a postman or messenger carries a sealed letter, of the contents of which he is ignorant.

So, too, a servant or agent will be liable for any slander uttered on his master's behalf and by his master's orders : but here he cannot set up as a defence that he did not know his master's orders were illegal ; for he must be conscious of what he himself is saying.

Illustrations.

A compositor will be criminally liable for setting up the type of a libel ; so will the man whose business it is merely to clap down the press.

R. v. *Knell* (1728), 1 Barnard. 305.

R. v. *Clerk*, 1 Barnard. 304.

A porter who, in the course of business, delivers parcels containing libellous handbills, is not liable in an action for libel, if shown to be ignorant of the contents of the parcel ; for he is but doing his duty in the ordinary way.

Day v. *Bream*, 2 M. & Rob. 54.

A master or principal will be liable to an action, if false defamatory words be spoken or published by his servant or agent with his authority and consent. The mere fact that the actual publisher was the servant or agent of the defendant is not alone sufficient ; for authority to commit an unlawful act will not in general be presumed. It must be further proved that the servant or agent had instructions from the defendant to speak or publish the words complained of.

Where the instructions are express, there can be no difficulty. But the inclination of our Courts has of late years been not to press the doctrine of implied authority so far as was done in older cases. [*412] However, it is clear law that the proprietor of a newspaper is both civilly and criminally responsible for whatever appears in its columns, although the publication may have been made without his knowledge, and in his absence. For he must be taken to have ordered his servants to print and publish whatever the editor might send them for that purpose. The proprietor trusts to the discretion of the editor to exclude all that is libellous ; if the editor fails in this duty, still the paper and all its contents will be printed and published by the proprietor's servants, by virtue of his general orders. So, if a master-printer has contracted to print a monthly magazine, he will be liable for any libel that may appear in any number printed at his office. So, every bookseller must be taken to have told his shopmen to sell whatever books or pamphlets are in his shop for sale ; if any one contain libellous matter, the bookseller is (*primâ facie* at all events) liable for its publication by his servant by reason of such general instructions. But where a master's orders are such that they can be obeyed without any illegality, he is not liable because his servant chooses to carry them out illegally and

tortiously, even although the servant honestly believes that he is best serving his master's interests by thus executing his business.

But although the master has not authorized the act of the servant, still if it was done for his benefit and on his behalf, he may subsequently *ratify* it. *Omnis ratihabitio priori mandato æquiparatur.* But "in order that there may be a valid ratification, there must be both a knowledge of the fact to be ratified, and an intention to ratify it." (Per Keating, J., in *Edwards* v. *London & N. W. Ry. Co.*, L. R. 5 C. P. 449.) The master must do something more than merely stand by and let the servant act. Non-intervention is not ratification. (*Moon* v. *Towers*, 8 C. B. N. S. 611; *Weston* v. *Beeman and another*, 27 L. J. Ex. 57.)

Illustrations.

At a meeting of a board of guardians, at which reporters were present, the chairman made a statement reflecting on the plaintiff, and added, "I am glad gentlemen of the press are in the room, and I hope they will take notice of it; publicity should be given to the matter." A report accordingly appeared in two local papers. *Held*, by the majority of the Exchequer Chamber (three judges against two) that there was some evidence to go to the jury that the [*413] defendant had expressly authorized the publication of the alleged libel in the newspapers.

Parkes v. *Prescott and another*, L. R. 4 Ex. 169; 88 L. J. Ex. 105; 17 W. R. 773; 20 L. T. 537.

See also *Clay* v. *People*, 86 Ill. 147.

Turpley v. *Blabey*, 2 Bing. N. C. 437; 2 Scott, 642; 1 Hodges, 414; 7 C. & P. 395.

The defendant's daughter, a minor, was authorized to make out his bills and write his general business letters; she chose to insert libellous matter in one letter. The father was held not liable for the wrongful act of his daughter, in the absence of any direct instructions.

Harding v. *Greening*, 8 Taunt. 42; 1 Moore, 477; Holt, N. P. 531.

See *Moon* v. *Towers*, 8 C. B. N. S. 611.

The defendant Moyes regularly printed *Fraser's Magazine*; but had nothing to do with preparing the illustrations. One number contained a libellous lithographic print. The defendant, the printer, was held liable for this print, though he had never seen it; because it was referred to in a part of the accompanying letterpress, which had been printed by his servants. A rule on this point was refused. The editor was of course liable also.

Watts v. *Fraser and Moyes*, 7 C. & P. 369; 6 A. & E. 223; 1 Jur. 671; 1 M. & Rob. 449; 2 N. & P. 157; W. W. & D. 451.

The proprietor of a newspaper will be held liable for an accidental slip made by his printer's man in setting up the type.

Shepheard v. *Whitaker*, L. R. 10 C. P. 502; 32 L. T. 402.

And for a libellous advertisement inserted by the editor without his knowledge.

Harrison v. *Pearce*, 1 F. & F. 567; 32 L. T. (Old S.), 298.

The proprietor of a newspaper in America on going away for a holiday expressly instructed his acting editor to publish nothing exceptionable, personal or abusive, and warned him especially to scan very particularly any article brought in by B., who was known to be a "smart" writer. The editor permitted an article of B.'s to appear which contained libellous matter. The proprietor was held liable, though the publication was made in his absence and without his knowledge.

Dunn v. *Hall*, 1 Carter (Indiana), 345; 1 Smith, 288.

Huff v. *Bennett*, 4 Sand. (New York), 120.

Curtis v. *Mussey*, 6 Gray (Mass.), 261.

Andres v. *Wells*, 7 Johns. (New York) 260.

A master or principal is criminally liable for any libel published by his servant or agent with his authority or consent. At common law he was criminally liable for such libel, even although he had no knowledge of it, if his servant was acting in pursuance of general orders. Whenever an employer was civilly liable for a libel published by his servants, he was, before Lord Campbell's Act, criminally liable also. But now by sect. 7 of that Act (6 & 7 Vict. c. 96), [*414] it is enacted "that whensoever, upon the trial of any indictment or information for the publication of a libel, under the plea of 'Not guilty,' evidence shall have been given which shall establish a presumptive case of publication against the defendant by the act of any other person by his authority, it shall be competent to such defendant to prove that such publication was made without his authority, consent or knowledge, and that the said publication did not arise from want of due care or caution on his part." Hence the proprietor of a newspaper is no longer criminally liable for a libel which has appeared in it without his knowledge or consent, merely because he has given the editor a general authority to insert what he thinks fit therein. *R.* v. *Holbrook and others*, 3 Q. B. D. 60; 47 L. J. Q. B. 35; 26 W. R. 144; 37 L. T. 530; 13 Cox, C. C. 650; 4 Q. B. D. 42; 48 L. J. Q. B. 113; 27 W. R. 313; 39 L. T. 536; 14 Cox, C. C. 185.)

Illustrations.

The defendant kept a pamphlet-shop: she was sick and upstairs in bed: a libel was brought into the shop without her knowledge, and subsequently sold by her servant on her account. She was held criminally liable for the act of her servant, on the ground that "the law presumes that the master is acquainted with what his servant does in the course of his business."

R. v. *Dodd*, 2 Sess. Cas. 33.

Nutt's Case, Fitzg. 47; 1 Barnard. K. B. 306.

[But I doubt if later judges would have been quite so strict; the sickness upstairs would surely have been held an excuse, even before the 6 & 7 Vict. c. 96, s. 7, became law. See

R. v. *Almon*, 5 Burr. 2686.]

A libel was published in a London newspaper, *The Morning Journal*. At the time of publication, Mr. Gutch, one of the proprietors, was away ill in Worcestershire, in no way interfering with the conduct of the paper, which was managed entirely by Alexander. Lord Tenterden directed the jury to find Gutch guilty, on the ground that it was with his capital that the paper was carried on, that he derived profit from its sale, and that he had selected the editor who had actually inserted the libel. Lord Tenterden the next day admitted (p. 438) that some possible case might occur in which the proprietor of a newspaper might be held not criminally answerable for a libel which had appeared in it. Gutch was convicted, but subsequently discharged on his own recognizances.

R. v. *Gutch, Fisher, and Alexander*, Moo. & Mal. 433.

R. v. *Walter*, 3 Esp. 21.

And see *Attorney-General* v. *Siddon*, 1 Cr. & J. 220.

The defendant told the editor of a newspaper several good stories against the [*415] Rev. J. K., and asked him to "show Mr. K. up;" and the editor subsequently published the substance of them in the paper, and the defendant read it and expressed his approval; this was held a publication by the defendant, although the editor knew of the facts from other quarters as well.

R. v. *Cooper*, 8 Q. B. 533; 15 L. J. Q. B. 206.

The defendants were the proprietors of the *Portsmouth Times and Naval Gazette;* each of them managed a different department of the newspaper, but

the duty of editing what was called the literary department was left by them entirely to an editor whom they had appointed, named Green. The libel in question was inserted in the paper by Green without the express authority, consent, or knowledge of the defendants. At the trial of a criminal information the judge directed a verdict of guilty against the defendants. *Held*, by Cockburn, C. J., and Lush, J., that there must be a new trial; for upon the true construction of 6 & 7 Vict. c. 96, s. 7, the libel was published without the defendants' authority, consent, or knowledge, and it was a question for the jury whether the publication arose from any want of due care and caution on their part: by Mellor, J., dissenting, that the defendants, having for their own benefit employed an editor to manage a particular department of the newspaper, and given him full discretion as to the articles to be inserted in it, must be taken to have consented to the publication of the libel by him; that 6 & 7 Vict. c. 96, s. 7, had no application to the facts proved, and that the case was properly withdrawn from the jury.

R. v. *Holbrook and others*, 3 Q. B. D. 60; 47 L. J. Q. B. 35; 26 W. R. 144; 37 L. T. 530; 13 Cox, C. C. 650.

On the new trial Green was called as a witness, and stated that he had general authority to conduct the paper, that the defendants left it entirely to his discretion to insert what he pleased, and that he had allowed the letter complained of to appear in the paper without the knowledge or express authority of the defendants, one of whom was absent from Portsmouth at the time. The jury found all the defendants guilty. On a motion for a new trial, on the ground that the verdict was against evidence, and of misdirection, held by (Cockburn, C. J., and Lush, J., Mellor, J., still dissenting), that the general authority given to the editor was not *per se* evidence that the defendants had authorized or consented to the publication of the libel, within the meaning of 6 & 7 Vict. c. 96, s. 7, and that, as the learned judge at the trial had summed up in terms which might have led the jury to suppose that it was, and the jury had apparently given their verdict on that footing, there must be another new trial.

R. v. *Holbrook and others*, 4 Q. B. D. 42; 48 L. J. Q. B. 113; 27 W. R. 313; 39 L. T. 536; 14 Cox, C. C. 185.

The prosecutor, Mr. John Howard, Clerk of the Peace for the borough of Portsmouth, died shortly afterwards, so the proceedings dropped, and no third trial ever took place.

And see *R.* v. *Bradlaugh and others*, 15 Cox, C. C. 217, *post*, p. 436.

R. v. *Ramsey and Foote*, 15 Cox, C. C. 231.

9. *Corporations and Companies.*

A corporation may sue for any libel upon it, as distinct from a libel upon its individual members. It may also [*416] sue for a slander upon it in the way of its business or trade. If, however, the corporation be not engaged in any business, it would probably be necessary to prove special damage in any case of slander, and this would be difficult.

A corporation "could not sue in respect of an imputation of murder, or incest, or adultery, because it could not commit those crimes. Nor could it sue in respect of a charge of corruption; for a corporation cannot be guilty of corruption, although the individuals composing it may be." (Per Pollock, C. B., 4 H. & N. 90.)

The law is the same with regard to unincorporated trading companies, which may sue for libel in the manner directed by the special Act creating them, or any statute applicable to them. (*Williams* v. *Beaumont*, 10 Bing. 260; 3 M. & Scott, 705.)

Corporations and companies may maintain actions for slander of their title; whether the slander be uttered by one of their own members or by a stranger. (*Metropolitan Omnibus Co.* v. *Hawkins*,

4 H. & N. 87 ; 28 L. J. Ex. 201 ; 5 Jur. N. S. 226 ; 7 W. R. 265 ; 32 L. T. (Old S.) 281 ; *Trenton Insurance Co.* v. *Perrine*, 3 Zab. (New Jersey) 402.)

A corporation is not, it is submitted, liable for any slander uttered by an officer, even though he honestly believe that he is acting for the benefit of the company and within the scope of his duties ; unless it can be proved that the corporation expressly ordered and directed that officer to say those very words.

A corporation will be liable to an action for a libel published by its servants or agents, whenever such publication comes within the scope of the general duties of such servants or agents, or whenever the corporation has expressly authorized or directed such publication. (See *ante*, *Master and Servant*, p. 411 ; *Yarborough* v. *Bank of England*, 16 East, 6 ; *R.* v. *City of London*, E. B. & E. 122, n. ; *Latimer* v. *Western Morning News Co.*, 25 L. T. 44 ; *Abrath* v. *North Eastern Ry. Co.*, 11 App. Cas. 253, 254 ; 55 L. J. Q. B. 460 ; 55 L. T. 65, 66. And in America, *Aldrich* v. *Press Print-*
[*417] *ing Co.*, 9 Min. 133 ; *Johnson* v. *St. Louis Dispatch Co.*, 65 Missouri, 539 ; 2 M. App. R. 565 ; 27 Amer. R. 293.)

Whether a corporation can be guilty of malice, so as to destroy a *primâ facie* privilege arising from the occasion of publication, has not yet been decided ; but *semble* (per Lord Campbell, C. J., E. B. & E. 121 ; 27 L. J. Q. B. 231) it can.

A corporation can be indicted for libel and fined. (Per Lord Blackburn in *Pharmaceutical Society* v. *London and Provincial Supply Association*, 5 App. Cas. 869, 870 ; 49 L. J. Q. B. 742 ; 28 W. R. 960 ; 43 L. T. 389 ; dissenting from the remarks of Bramwell, L. J., in the Court below, 5 Q. B. D. 313 ; 49 L. J. Q. B. 338; 28 W. R. 698 ; 42 L. T. 569.)

Illustrations.

A joint-stock company, incorporated under the 19 & 20 Vict. c. 47, may sue in its own corporate name for words imputing to it insolvency, dishonesty, and mismanagement of its affairs, and this although the defendant be one of its own shareholders.

Metropolitan Omnibus Co. v. *Hawkins*, 4 H. & N. 87 ; 28 L. J. Ex. 201 ; 5 Jur. N. S. 226 ; 7 W. R. 265 ; 32 L. T. (Old S.) 281.

Where, before the 19 & 20 Vict. c. 47, a joint-stock insurance company, though not incorporated, was authorized by statute to sue in the name of its chairman, it was held that the chairman might bring an action for a libel which attacked the mode in which the company carried on its business.

Williams v. *Beaumont*, 10 Bing. 260 ; 3 M. & Scott, 705.

A railway company was held liable for transmitting a telegram to the effect that the plaintiff's bank had stopped payment.

Whitfield and others v. *South Eastern Railway Co.*, E. B. & E. 115 ; 27 L. J. Q. B. 229 ; 4 Jur. N. S. 688.

10. *Partners.*

Partners could always jointly sue for a libel defamatory of the firm. (*Ward and another* v. *Smith*, 6 Bing. 749 ; 4 C. & P. 302 ; *LeFanu* v. *Malcolmson*, 1 H. L. C. 637.) But in such an action no damages could formerly have been given for any private injury

thereby caused to any individual partner ; nor for the injury to the feelings of each member of the firm. Only joint damages could be [*418] recovered in the joint action ; for the basis of such action was the injury to their joint trade. (*Haythorn* v. *Lawson*, 3 C. & P. 196 ; *Robinson* v. *Marchant*, 7 Q. B. 918 ; 15 L. J. Q. B. 134.) But now, by virtue of Order XVIII. r. 6, " claims by plaintiffs jointly may be joined with claims by them or any of them separately against the same defendant." (And see Order XVI. r. 1.) Hence it is no longer necessary to bring two actions for the same words : each individual partner should be named on the writ, and he can then recover separate damages for any special injury done to himself, the firm at the same time recovering their joint damages. (See *Booth and others* v. *Briscoe*, 2 Q. B. D. 496 ; 25 W. R. 838 ; *post*, p. 419.) If, however, one partner be defamed as to his private life, the conduct of the firm not being attacked directly or indirectly, nor any special damage resulting to them from defendant's words, then the individual partner should sue alone.

If a partner in conducting the business of a firm causes a libel to be published, the firm will be liable as well as the individual partner. So, if any agent or servant of the firm defames any one by the express direction of the firm, or in accordance with the general orders given by the firm for the conduct of their business ; *ante*, p. 411. But if there be any doubt as to the liability of the firm, it is always safer to join the individual partner or agent or servant as a co-defendant with the firm. (See Order XVI. rr. 4, 7.)

Illustrations.

If one partner be libelled in his private capacity he cannot recover for any special damage which has resulted to the business of the firm. All the partners should sue for that jointly. They may now do so in the same action.

Solomons and others v. *Medex*, 1 Stark. 191.
Robinson v. *Marchant*, 7 Q. B. 918 ; 15 L. J. Q. B. 134 ; 10 Jur. 156.
Cook and another v. *Batchellor*, 3 Bos. & Pul. 150.
Maitland and others v. *Goldney and another*, 2 East, 426.

Similarly, if the firm be libelled as a body, they cannot jointly recover for any private injury to a single partner ; though that partner may now recover his individual damages in the same action.

Haythorn v. *Lawson*, 3 C. & P. 196.
LeFanu v. *Malcolmson*, 1 H. L. C. 637 ; 13 L. T. (O. S.) 61 ; 8 Ir. L. R. 418.

[* 419] But if insolvency be imputed to one member of a firm, this is a reflection on the credit of the firm as well : therefore either he, or the firm, or both, may sue, each for their own damages.

Harrison v. *Berington*, 8 C. & P. 708.
Foster and others v. *Lawson*, 3 Bing. 452 ; 11 Moore, 360.

11. *Other Joint Plaintiffs.*

" All persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally, or in the alternative. And judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to, without any amendment.

But the defendant, though unsuccessful, shall be entitled to his costs occasioned by so joining any person who shall not be found entitled to relief, unless the Court or a judge in disposing of the costs shall otherwise direct." (Order XVI. r. 1.)

By virtue of this rule, an action of libel or slander may now be brought by two or more persons jointly, although they are not in partnership or otherwise jointly interested. *Barratt* v. *Collins*, 10 Moo. 451, must be considered overruled. The damages in such an action ought to be claimed and assessed separately; but if they be assessed jointly, and the plaintiffs be content with such a verdict, the defendant cannot avail himself of the defect. (*Booth and others* v. *Briscoe*, 2 Q. B. D. 496; 25 W. R. 838.)

Illustrations.

A charity near Wisbeach was managed by a body of trustees, eight in number. A libellous letter was published in the *Wisbeach Chronicle*, imputing to the trustees misconduct in the management of the funds of the charity. The eight trustees sued the proprietor of the paper in one joint action for the libel. *Held*, that they were empowered so to do by Order XVI. r. 1; although before the Judicature Act, it would never have been allowed. The jury having returned a single verdict for the plaintiffs, damages 40*s*., the Court of Appeal refused, on the motion of the defendant, to disturb the verdict.

Booth and others v. *Briscoe*, 2 Q. B. D. 496; 25 W. R. 838.

[*420] Two co-proprietors of a newspaper may sue jointly for a libel on their paper without proving special damage; and the jury may find the damages generally.

Russell and another v. *Webster*, 23 W. R. 59.

12. *Joint Defendants.*

"All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative. And judgment may be given against such one or more of the defendants as may be found to be liable, according to their respective liabilities, without any amendment." (Order XVI. r. 4; and see rr. 5, 7.)

Under these rules a joint action can now be maintained against two or more persons for slander. Formerly this was impossible. (*Chamberlain* v. *White*, Cro. Jac. 647; *S. C.*, *sub nomine Chamberlaine* v. *Willmore*, Palm. 313.) Even if husband and wife uttered similar words simultaneously, there were two separate publications, and an action had to be brought against the husband alone for what he said; against both husband and wife for her words. (*Burcher* v. *Orchard et ux.* (1652), Style, 349; *ante*, p. 404; *Swithin et ux.* v. *Vincent et ux.* (1764), 2 Wils. 227; and in America, *Tait* v. *Culbertson*, 57 Barb. 9.) But with libel it was different; the publication of a libel might well be the joint act of two or more persons, who might in such a case be sued either jointly or separately at the election of the plaintiff. Thus, if a master and servant jointly published a libel, they might always have been jointly sued in the same action. But if there were two distinct publications of the same libel, one by A. separately, the other by B., two actions must for-

merly have been brought, one for each publication. Now, however, a plaintiff can, if he like, sue both A. and B. in the same action, and recover from each damages proportioned to the injury each publication has caused him.

But the plaintiff is not now, and never was, obliged to join as a defendant every person who was liable. He may, if he prefers, sue only one or two ; and the liability of the others will be no defence for those sued, and will not mitigate the damages recoverable. And the defendants sued cannot recover any share of damages or costs from the [*421] others, who might have been, but are not, sued. (*Colburn* v. *Patmore*, 1 C. M. & R. 73 ; 4 Tyr. 677.) But the judgment against these is a bar to any subsequent action on the same publication against any one else who was jointly liable with them therefor : see *post*, p. 522.

Joint defendants may counter-claim jointly, or one or more of them separately, against the plaintiffs, or some or one of them, jointly or separately, or against one plaintiff and a third party. (See Order XVI. r. 3.) Such a counter-claim will, however, be struck out if it cannot be conveniently disposed of in the pending action; see *post*, p. 543.

Illustration.

The members of the committee of the Reform Union were held jointly liable for publishing a report charging the plaintiff and others by name with bribery at the Berwick election.

Wilson v. *Reed and others*, 2 F. & F. 149.

[*422] CHAPTER XV.

CRIMINAL LAW.

It is a misdemeanour at common law, punishable on indictment or information with fine and imprisonment, to speak any blasphemous,obscene, or seditious words in the hearing of others. *A fortiori*, it is a misdemeanour to write and publish blasphemous, obscene, or seditious words.

It is a misdemeanour at common law, punishable on indictment or information with fine and imprisonment, to write and publish defamatory words of any living person, or exhibit any picture or effigy defamatory of him. It is not a crime merely to speak such words, however maliciously.

A libel on a *thing* is no crime ; and wherever no action would lie without proof of special damage, no indictment or information can be preferred.

Whatever words would be deemed defamatory of a living person in any civil action will be held a libel on the trial of an indictment. All the rules laid down in Chapters II., III., VIII., IX., as to *Bonâ Fide* Comment, Construction and Certainty, Privilege, and Malice, apply equally to civil and criminal proceedings.

It will be an aggravation of the offence, if the person libelled be a foreign prince, statesman or ambassador ; for such a libel would embarrass the government, and might disturb the friendly relations between England and that foreign country. (See *post*, p. 430.)

It is a misdemeanour at common law, punishable on indictment with fine and imprisonment, to write and publish defamatory words of any person deceased ; provided it [*423] be alleged and proved that this was done with intent to bring contempt and scandal on his family and relations and so provoke them to a breach of the peace. (5 Rep. 125*a* ; Hawkins, P. C. i. 542 ; *R.* v. *Topham*, 4 T. R. 126.)

It is also a misdemeanour to libel any sect, company or class of men, without mentioning any person in particular ; provided it be alleged and proved that such libel tends to excite the hatred of the people against all belonging to such sect or class, and conduces to a breach of the peace. (*R.* v. *Gathercole*, 2 Lewin, C. C. 237.)

Such intention may sufficiently appear from the words of the libel itself, or it may be proved by the consequences, if any, of its publication.

The criminal remedy for libel, as it is the earlier, so it is the more extensive remedy ; a libel may be indictable, though it be not actionable. Thus in neither of the above cases would an action

lie, for want of a proper plaintiff. (And see *R.* v. *Darby*, 3 Mod. 139.)

In *Reg. pros. Vallombrosa* v. *Labouchere*, 12 Q. B. D. 320 ; 53 L. J. Q. B. 362 ; 32 W. R. 861 ; 50 L. T. 177 ; 15 Cox, C. C. 415 ; 48 J. P. 165, the Court expressed some doubt as to whether it was a crime to libel a dead man, but abstained from expressing any decided opinion on the point. This doubt certainly operated as one reason among others for refusing the extreme remedy of a criminal information in that case ; and it will thus be very difficult to obtain a criminal information in any subsequent case of libel on a person deceased. But these *dicta* do not appear to me to at all affect the remedy by way of indictment, and I think the law remains as stated above. See, however, *R.* v. *Ensor*, 3 Times L. R. 366.

It is not necessary to prove that the libeller in fact desired that a breach of the peace should follow on his publication ; that is probably the last thing he wished for ; still less is it necessary to prove that an actual assault ensued, though, if it did, evidence of such assault is admissible. (*R.* v. *Osborn*, Kel. 230 ; 2 Barnard. 138, 166.) It is sufficient if the necessary or natural effect of defendant's words is to vilify the memory of the deceased and to injure his posterity to such an extent as to render a breach of the peace imminent or probable.

Illustrations.

Libel complained of : "On Saturday evening died of the small-pox at his house in Grosvenor Square, Sir Charles Gaunter Nicoll, Knight of the Most Honour [* 424] able Order of the Bath, and representative in Parliament for the town of Peterborough. He could not be called a friend to his country, for he changed his opinions for a red ribbon, and voted for that pernicious object, the excise." It was alleged that this passage was published with intent to vilify, blacken, and defame the memory of the said Sir Charles, and to stir up the hatred and evil will of the people against the family and posterity of the said Sir Charles. An information was granted.

R. v. *Critchley* (1734), 4 T. R. 129, n.

But an indictment which alleged that a libel on the late Earl Cowper had been published with intent to disgrace and vilify his memory, reputation, and character, but did not go on to aver any intent to create ill blood or throw scandal on the children and family of Earl Cowper, or to provoke them to a breach of the peace, was held bad, after a verdict of guilty, and judgment arrested.

R. v. *Topham*, 4 T. R. 126.

And, *à fortiori*, to discuss the characters of deceased statesmen and noblemen, as a matter of history, is no crime.

Per Lord Kenyon, C. J., *ib.* 129.

But if in discussing the character and policy of William III. and George I., discredit is thrown on the character and administration of the present king (George II.), with intent to spread dissatisfaction among his subjects, the publication is a seditious libel.

R. v. *Dr. Shebbeare* (1758), cited in Lord Mansfield's judgment in *R.* v. *Dean of St. Asaph*, 3 T. R. 430, n.

The defendant published a sensational account of a cruel murder committed by certain Jews said to have lately arrived from Portugal, and then living near Broad Street. They were said to have burnt a woman and a new-born baby, because its father was a Christian. Certain Jews who had arrived from Portugal, and who then lived in Broad Street, were attacked by the mob, barbarously treated, and their lives endangered. A criminal information was

granted, although it was objected that it did not appear precisely who were the persons accused of the murder.

R. v. *Osborn*, Kel. 230; 2 Barnard. 138, 166.

It is a crime to write of a Roman Catholic nunnery that it is a "brothel of prostitution;" for this is an aspersion on the characters of the nuns in general, though none are singled out by name.

R v. *Gathercole* (1838), 2 Lew. C. C. 237.

R. v. *J. A. Williams* (1822), 2 B. & Ald. 595; 2 Townsend's Modern State Trials, 231.

A pamphlet reflecting on the government and asserting that its officers are corrupt, ignorant, and incapable, will be a libel, and punishable as a crime; although no particular member of the government, and no individual officer, is mentioned or referred to.

R. v. *Tutchin*, 14 Howell's St. Tr. 1095; 5 St. Tr. 527; Holt, 56; 2 Lord Raym. 1061; 1 Salk. 50; 6 Mod. 268.

A notice was posted in church calling attention to certain abuses permitted by "the trustees" of Lambeth workhouse; an information was granted on behalf of the whole body of trustees [although the trustees could not before the Judicature Act have jointly sued for the libel; *ante*, p. 419].

R. v. *Griffin*, 1 Sess. Cas. 257.

[*425] An information was granted for a libel commencing:—"Whereas an East India director has raised the price of green tea to an extravagant rate," although there was nothing to show which particular director was intended.

R. v. *Jenour*, 7 Mod. 400.

But an indictment for a libel on "persons to the jurors unknown" is bad, even after verdict.

R. v. *Orme* (vel *Alme*) *and Nutt*, 1 Ld. Raym. 486; 3 Salk. 224.

It is a misdemeanour at common law to utter words which amount to a direct challenge to fight a duel, or to utter insulting words with the intention of provoking another to send a challenge. (*R.* v. *Philipps*, 6 East, 464, and note on p. 476.) *A fortiori*, it is a misdemeanour to write a challenge or to consciously deliver a written challenge. And indeed all words which amount to a solicitation to commit a crime, whether spoken or written, are indictable, whether the person solicited commit the crime or not. (*R.* v. *Higgins*, 2 East, 5.)

It is also said to be a misdemeanour to fabricate and publish false news in writing (Dig. L. L. 23), or to endeavour, by spreading false rumours, to raise or lower the price of food or merchandise. (See *R.* v. *Waddington* (1800), 1 East, 143.) According to Scroggs, J., it is a misdemeanour to publish any news at all, though true and harmless. (See 11 Hargrave's St. Tr. 322.) Where eight persons combined to raise the price of Government stocks on Feby. 21st, 1814, by spreading a false rumour of the death of Napoleón Buonaparte, they were indicted and convicted of a conspiracy, for their common purpose was illegal. (*R.* v. *De Berenger*, 3 M. & S. 67.) But this is scarcely an authority for holding that the merely spreading a false rumour is in itself indictable. The statutes of *Scandalum Magnatum*, 3 Edw. I. c. 34; Rich. II. st. 1, c. 5; and 12 Rich. II. c. 11, are set out *ante*, pp. 134–6; they are, however, practically obsolete.

In all the above cases of misdemeanour at common law, the defendant may be fined or imprisoned, or both; but he cannot be

sentenced to hard labour. He may also be required to find sureties to keep the peace and to be of good behaviour for any length of time. A married woman could not, before the Married Women's Property Act, be [*426] fined; but she could be required to find sureties, though she could not enter into recognizances herself.

None of the above offences can be tried at quarter sessions, except an indictment for obscene words; *post*, p. 471.

Certain statutes have been passed in aid of the common law:—

By the 6 & 7 Vict. c. 96, s. 3, it is a misdemeanour to publish, or threaten to publish, any libel upon any other person, or to threaten to publish, or propose to abstain from publishing, or to offer to prevent the publishing of, any matter or thing touching another, with intent to extort money or gain, or to procure for any one any appointment or office of profit. The offender may be sentenced to imprisonment for any term not exceeding three years, either with or without hard labour.

Except under the first clause of the section, the matter or thing threatened to be published need not be libellous; the intent to extort money is the gist of the offence; and a demand of money which defendant honestly believes to be due and owing to him is no evidence of such an intent. (*R.* v. *Coghlan*, 4 F. & F. 316.) The commencement of legal proceedings is not "a publishing of any matter or thing" within the meaning of the section. (*R.* v. *Yates and another*, 12 Cox, C. C. 441.) A corporation is not a "person" within the meaning of this section. (*R.* v. *M'Laughlin*, 14 J. P. 291.)

By the 6 & 7 Vict. c. 96, s. 4, it is a misdemeanour to maliciously publish any defamatory libel knowing the same to be false; the punishment may be fine or imprisonment, or both, such imprisonment not to exceed two years.

By the 6 & 7 Vict. c. 96, s. 5, it is a misdemeanour to maliciously publish any defamatory libel; the punishment may be fine or imprisonment, or both, such imprisonment not to exceed one year.

See the whole statute in Appendix D., *post*, pp. 716–9.

[*427] By the 24 & 25 Vict. c. 96, ss. 46, 47, it is a felony to accuse or threaten to accuse another of any infamous crime, whether by letter or otherwise, with intent to extort money or gain. The offender may for each letter he has sent be sentenced to penal servitude for life, or for any term not less than three years [now *five* years, 27 & 28 Vict. c. 427, s. 428], or to imprisonment, with or without hard labour, for any term not exceeding two years. (See *R.* v. *Redman*, L. R. 1 C. C. R. 12; 39 L. J. M. C. 89; *R.* v. *Ward*, 10 Cox, C. C. 42; and before this Act, *R* v. *Southerton*, 6 East, 126.

Criminal Informations.

In some cases of indictable words, the prosecutor may also, if he prefer, proceed by way of criminal information.

Criminal informations are of two kinds :

(i) Those filed by the Attorney-General himself, usually called *ex officio* informations.

(ii) Those filed by the Queen's coroner and attorney by the direction of the Queen's Bench Division at the instance of some private individual.

(i) The first class is, as a rule, confined to libels of so dangerous a nature as to call for immediate suppression by the officers of the State ; especially blasphemous, obscene, or seditious libels, or such as are likely to cause immediate outrage and public riot and disturbance. In these cases, therefore, the Attorney-General himself takes the initiative. There has I believe been no *ex officio* information filed in England since 1830.

(ii) In the second class of informations the relator is generally some private individual who has been defamed. But still the words complained of must be such as call for the prompt and immediate interference of the Court. There must be some evidence that the ordinary remedies by action or indictment are insufficient in the particular [*428] case. The Court, moreover, always looks at all the circumstances which occasioned or provoked the libel. Thus no information will be granted if the prosecutor relator has himself libelled the defendant (*R.* v. *Nottingham Journal*, 9 Dowl. 1042), or in any way invited the publication of the libel of which he now complains (*R.* v. *Larrieu*, 7 A. & E. 277), or had an opportunity of expressing his disapproval of its terms, of which he did not avail himself (*R.* v. *Lawson*, 1 R. B. 486 ; 1 Gale & D. 15), or has demanded and received explanations from the defendant (*Ex parte Doveton*, 7 Cox, C. C. 16 ; 26 L. T. (Old S.) 73 ; 19 J. P. 741 ; *Ex parte Haviland*, 41 J. P. 789), or has himself written to the papers or published a pamphlet provoking the libel (*R.* v *Hall*, 1 Cox, C. C. 344), or replying thereto (*Ex parte Rowe*, 20 L. T. (Old S.) 115 ; 17 J. P. 25). And generally, if the prosecutor has been guilty of any misconduct in relation to the matter, a rule will be refused, except in cases where the public have a direct and independent interest in the prompt suppression of such libels. (*R.* v. *Casey*, 13 Cox, C. C. 310 ; following *R.* v. *Norris*, 2 Lord Kenyon, 300.)

It is not necessary that the libel should charge a criminal offence to induce the Court to grant a criminal information. It is enough that the libel, though on a private individual, is one requiring prompt suppression. The rank and dignity of the person libelled was formerly taken into consideration ; and informations have been granted for imputing that the children of a marquis were bastards (*R.* v. *Gregory*, 8 A. & E. 907 ; 1 P. & D. 110) ; that a peer had married an actress (*R.* v *Kinnersley*, 1 Wm. Bl. 294) ; that a naval captain was a coward, a bishop a bankrupt, a peer a perjurer, &c., &c. But now it is settled that rank confers no superior claim to the summary interference of the Court. A peer is no more entitled to a criminal information when his *private* character is attacked than the humblest servant of the Queen. (*Reg. pros. Vallombrosa* v. *Labouchere*, 12 Q. B. D. 320 ; 53 L. J. Q. B. 362 ; 32 W. R. 861 ; 50 L. T. 177 ; 15 Cox, C. C. 415 ; 48 J. P. 165.) [*429] A grocer ob-

tained a criminal information for a libel in *R.* v. *Benfield*, 2 Burr. 980; a housekeeper in *R.* v. *Tunfield*, 42 J. P. 423.

But latterly the Court has been much more chary of granting criminal informations; and in future they will, as a rule, be only granted where the applicant holds some public office or position in England (*Reg.* v. *Labouchere*, *ubi supra*); or where the libel tends to obstruct the course of justice, or to prejudice the fair trial of any accused person. (*R.* v. *Watson and others*, 2 T. R. 199; *post*, p. 493; *R.* v. *Jolliffe*, 4 T. R. 285; *R.* v. *White*, 1 Camp. 359, n.; *Ex parte Duke of Marlborough*, 5 Q. B. 955; 13 L. J. M. C. 105; 1 Dav. & Mer. 720; *R.* v. *Gray*, 10 Cox C. C. 184.)

So, if there be general reflections on a body or class, no particular individual being specially attacked; still if the words are likely to cause outrage and violence, the Court will grant an information: as where the libel was on the Jews, and certain Jews in consequence had been ill-used by the mob (*Anon.*, 2 Barnard. 138; *R.* v. *Osborn*, *ib.* 166, *ante*, p. 424; so where the general body of clergymen in a particular diocese were libelled (*R.* v. *Williams*, 5 B. & Ald. 595); or a public body, such as the directors of the East India Company. (*R* v. *Jenour*, 7 Mod. 400.)

But no information will be granted for a libel contained in a private letter never made public (*Ex parte Dale*, 2 C. L. R. 870); nor for any matter of mere trade dispute, even though fraud be imputed; nor in any case where no malicious intention appears (*Ex parte Doveton*, 7 Cox, C. C. 16; 19 J. P. 741; 26 L. T. (Old S.) 73); nor where the remedy by action or indictment is sufficient. (*Reg.* v. *Mead*, 4 Jur. 1014; *Re* "*Evening News*," 3 Times L. R. 255.)

A fortiori, no information will be granted where the words are privileged by reason of the occasion on which they were employed (*R.* v. *Baillie* (1790), Holt, N. P. 312, n.; *Ex Parte Hoare*, 53 L. T. 83); or where they appear to be true. (*R.* v. *Draper*, 3 Smith, 390.)

In every case the application for a criminal information [*430] must be made promptly: any delay in making the application after knowledge of the libel has reached the prosecutor will be ground for refusing an information, unless such delay can be satisfactorily explained. The prosecutor, too, must come to the Court in the first instance, and must not have attempted to obtain redress in other ways before applying for a criminal information.

Illustrations.

An information was refused where the alleged libel was proved to be a true copy of a report of a Committee of the House of Commons, though it did reflect on the individual prosecutor, and though its publication was not authorized by the House.

R. v. *Wright*, (1799), 8 T. R. 293.

A French gentleman, D'Eon de Beaumont, published a libel on the Count de Guerchy, then French Ambassador in England. The libel chiefly referred to private disputes between D'Eon and the Count, alleging that the Count had supplanted D'Eon at the Court of Versailles by trickery; but it also reflected

on the public conduct of the ambassador, and insinuated that he was not fit for his post. An information was filed and D'Eon convicted. (Lord Mansfield.)

R v. *D'Eon* (1764), 3 Burr. 1514 ; 1 W. Bl. 501 ; Dig. L. L. 88.

And see *R.* v. *Peltier* (1803), 28 Howell's St. Tr. 617 ; *ante*, p. 409.

Lord George Gordon was tried in 1787 and convicted upon an information charging him with libelling Marie Antoinette, Queen of France, and "her tool" the French Ambassador in London. He was fined £500 and sentenced to two years' imprisonment, and at the expiration of that time to find sureties for his good behaviour. This he could not do, so he remained in prison till he died on November 1st, 1793. (Ashurst, J.)

R v. *Lord George Gordon*, 22 Howell's St. Tr. 177.

The *Courier* published the following passage :—"The Emperor of Russia is rendering himself obnoxious to his subjects by various acts of tyranny, and ridiculous in the eyes of Europe by his inconsistency. He has now passed an edict prohibiting the exportation of timber, deals, and other naval stores. In consequence of this ill-timed law, upwards of 100 sail of vessels are likely to return to this country without freights." This was deemed a libel upon the Emperor Paul I. An information was granted, and the proprietor of the *Courier* was fined £100, sentenced to six months' imprisonment, and to find sureties for good behaviour for five years from the expiration of that term. The printer and publisher were also sentenced to one month's imprisonment. (Lord Kenyon, C. J.)

R. v. *Vint* (1799), 27 Howell's St. Tr. 627.

The Prince Regent obtained an information against the editor and printer of the *Examiner*.

R. v. *Leigh and John Hunt*, 3 Chit. Cr. L. 881.

Certain justices of Leicestershire obtained a rule for a criminal information [*431] for a libel imputing that, in convicting a particular prisoner, they had deliberately acted from motives of political partisanship.

Ex parte Hoskyns, 33 J. P. 68.

The mayor of a borough is entitled to a criminal information for a libel imputing to him gross misconduct in his office.

R v. *Brigstock*, Cole on Cr. Inf p. 23 ; 6 C & P. 184.

Ex parte the Mayor of Great Yarmouth, 1 Cox, C. C. 122.

Reg. v. *John Rea*, 17 Ir. C. L. R. 584 ; 9 Cox, C. C. 401.

And similarly a town clerk.

R. v. *Hatfield*, 4 C. & P. 244.

So is a bishop, "dishonourable and degrading conduct" being imputed to him *qua* bishop.

R v. *Clouter*, Cole on Cr. Inf. p 22.

A chief constable obtained a rule nisi for a libel imputing misconduct in his office.

Ex parte Parry, 41 J. P. 85.

A Queen's counsel obtained a criminal information for libellous verses and for a caricature imputing to him professional misconduct in the conduct of a case.

Sir W. Garrow's Case, 3 Chit. Cr. Law, 884.

But it was held that the musical critic of the *Times* was not entitled to a criminal information for a libel charging him with corruption, on the ground that his was not a public office.

Ex parte Davison, 42 J. P. 727 ; cited 12 Q. B. D, 328.

Nor a foreign duke, whose deceased father was libelled.

R. pros. Vallombrosa v. *Labouchere*, 12 Q B. D. 320 ; 53 L. J. Q. B. 362 ; 32 W. R. 861 ; 50 L. T. 177 ; 15 Co. C. C. 415; 48 J. P. 165.

The solicitors to a railway company were refused a rule for a criminal information for a libel on them by the directors, imputing extortion and fraud. They were left to bring an action.

Ex parte Baxter, 28 J. P. 326.

A county court judge illegally refused to hear a barrister who appeared before him. The barrister memorialised the Lord Chancellor. Obtaining no redress, he applied to the Court of Queen's Bench for a criminal information. This would have been granted him, had he not previously applied to the Lord Chancellor.

R v. *Marshall*, 4 E. & B. 475.

An Irish Q. C., in addressing the jury as counsel in a cause, made a fierce attack on the plaintiff, who was an attorney. This attack was pertinent to the issue and not malicious; at the same time, the observations were unusually harsh and irritating. The plaintiff won the action, and then wrote to the Q. C., calling on him to retract the charges he had made. The Q. C. refused; thereupon plaintiff wrote the Q. C. a letter, couched in the most offensive language, and obviously intended to provoke a duel. The Court made the rule for a criminal information absolute; but ordered that the information should not issue without further order.

Reg. pros. Armstrong, Q. C. v. *Kiernan*, 7 Cox, C. C. 6; 5 Ir. C. L. A. 171.

Reg. pros. Butt, Q. C. v. *Jackson*, 10 Ir. L. R. 120.

[*432] *Publication.*

The prosecutor must prove that the defendant published the defamatory words. In civil cases it is necessary to show a publication to some third person other than the person defamed. In criminal cases this is not absolutely necessary; it is sufficient to prove a publication to the prosecutor himself, provided the obvious tendency of the words be to provoke the prosecutor and excite him to break the peace. (*Hicks' case*, Hob. 215; Poph. 139; cited 6 East, 476; *Clutterbuck* v. *Chaffers*, 1 Stark. 471; *R.* v. *Wegener*, 2 Stark, 245; *Phillip* v. *Jansen*, 2 Esp. 624; *R.* v. *Hornbrook*, Selwyn's Nisi Prius, 12th ed. at p. 1065; 13th ed. at p. 1000; *R.* v. *Brooke*, 7 Cox, C. C. 251. See *post*, p. 594.)

In all other respects the law as to publication is practically identical in civil and criminal cases. (See c. VI., *ante*, pp. 151—169.)

Thus, both author, printer and publisher are each and all liable to be prosecuted for a libel contained in any book or newspaper. In the latter case the proprietor of the newspaper will also be liable. Every fresh publication of a libel is a fresh crime. The sale of every separate copy of a libel is a distinct offence. (*R.* v. *Carlile*, 1 Chitty, 453.) "Not only the party who originally prints, but every party who utters, who sells, who gives, or who lends a copy of an offensive publication will be liable to be prosecuted as a publisher." (Per Bayley, J., in *R.* v. *Carlile*, 3 B. & Ald. 169.) "The mere delivery of a libel to a third person by one conscious of its contents amounts to a publication, and is an indictable offence." (Per Wood B., in *Maloney* v. *Bartley*, 3 Camp. 213.)

In the last extract the learned Baron is careful to insert the words "by one conscious of its contents." For although any delivery to a third person will amount to a *primâ facie* publication, it is open to the defendant to prove, both in civil and criminal cases, that he delivered [*433] the libel without any knowledge of the libellous nature of its contents: *e.g.*, where a postman or messenger carries a sealed letter (per Lord Kenyon, C. J., in *R.* v. *Topham*, 4 T. R. 129), or a parcel in which libellous handbills were wrapped up (*Bay* v. *Bream*, 2 Moo. & Rob. 55), or where the defendant cannot read (per Lord Kenyon, in *R.* v. *Holt*, 5 T. R. 444). And see *Emmens* v. *Pottle* (C. A.), 16 Q. B. D. 354; 55 L. J. Q. B. 51; 34 W. R. 116; 53 L. T. 808; 50 J. P. 228. Even if the defendant had read the libel, yet if the words were innocent on the face of them, and only derived

a defamatory meaning from certain extrinsic facts and circumstances wholly unknown to him, then he would still be unconscious that what he published was a libel, and such a publication would be no crime ; *e.g.*, where the libel was contained in an allegory or a riddle, to which the defendant had no clue. Again, where the defendant copied a libel knowing it to be a libel, and afterwards inadvertently delivered such copy to a third person in mistake for some other paper, it is submitted that he would not be held criminally liable for such an accident, though he would be held liable in a civil case. (See the dicta of Lord Kenyon in *R.* v. *Topham*, 4 T. R. 139 ; and in *R.* v. *Lord Abingdon*, 1 Esp. 228 ; and the ruling of Abbott, C. J in *R.* v. *Harvey*, 2 B. & C. 257.) A person who took down in writing seditious words dictated by the composer was held guilty of a misdemeanour in *R.* v. *Paine*, Carth. 405, although apparently no subsequent publication by him was proved ; but if so, this case is bad law. (See *Lamb's Case*, 9 Rep. 60, cited *ante*, p. 157.)

A master will be liable criminally for the acts of his servant done in the ordinary course of his employment in pursuance of his master's orders, general or express. The criminal liability of a defendant for such constructive publication is now defined by the 7th section of Lord Campbell's Act (6 & 7 Vict. c. 96) which, however, rather declared than altered the existing law :—" Whensoever, upon the trial of any indictment or information for the publication of a libel, under the plea of not guilty, evidence shall have been given which shall establish a presumptive case of publication against the defendant by the act of any other person by his authority, it shall be competent to such defendant to prove that such publication was made without [*434] his authority, consent or knowledge, and that the said publication did not arise from want of due care or caution on his part."

The section only says that evidence may be given of such facts ; but it has always been construed to mean that such facts, if proved, shall be an answer to the indictment ; for such evidence was always admissible at common law in mitigation of punishment (if not in defence). The word " authority," in the above section, means something more than the general authority given by the proprietor of a newspaper to the editor to insert in the paper whatever he thinks fit. (*R.* v. *Holbrook and others*, 3 Q. B. D. 60 ; 47 L. J. Q. B. 35 ; 26 W. R. 144 ; 37 L. T. 530 ; 4 Q. B. D. 42 ; 48 L. J. Q. B. 113 ; 27 W. R. 313 ; 39 L. T. 536 ; *ante*, p. 415. And see *Ex parte Parry*, 41 J. P. 85.)

The section applies to all cases of criminal libel, blasphemous, seditious and otherwise. (*R.* v. *Bradlaugh and others*, 15 Cox, C. C. 218.)

Illustrations.

Merely to be in possession of a copy of a libel is no crime, unless some publication thereof ensue.

R. v. *Beere*, Carth. 409 ; 12 Mod. 219 ; Holt, 422 ; Salk. 417 ; 1 Lord Raym. 414.

John Lamb's Case, 9 Rep. 60, *ante*, p. 157.

Overruling *R.* v. *Algernon Sidney*, 9 Howell's St. Tr. 817, 867 ; 3 Hargrave's St. Tr. 807 ; 4 St. Tr. 197.

As soon as the manuscript of a libel has passed out of the defendant's possession and control, it is deemed to be published, so far as the defendant is concerned.

Per Holroyd, J., in *R.* v. *Burdett*, 4 B. & Ald. 143.

A libel was printed and published ; the printer produced the manuscript from which he had printed it, and this manuscript was proved to be in the handwriting of the prisoner ; there was no evidence to show that he authorized or directed the printing or publishing. This is evidence of publication sufficient to go to the jury, though the prisoner may give evidence to rebut it.

R. v. *Lovett*, 9 C. & P. 462.

Cooper told the editor of a newspaper several good stories against the Rev. J. K., and asked him to "show Mr. K. up ;" subsequently the editor published the substance of them in the newspaper ; this was held a publication by Cooper, although the editor knew of the facts from other quarters as well.

R. v. *Cooper*, 15 L. J. Q. B. 206 ; 8 Q. B. 533.

[*435] The defendant was the proprietor of *The Times*, but resided in the country leaving the management of the paper entirely to his son, with whom he never interfered. A libel on the late Lord Cowper having appeared therein, the defendant was held criminally liable, and convicted.

R. v. *Walter*, 3 Esp. 21

And see *R.* v. *Gutch, Fisher, and Alexander*, Mo. & Mal. 433.

A rule was granted calling on Wiatt to show cause why he should not be attached for selling a book containing a libel on the Court of King's Bench. The book was in Latin. On his filing an affidavit that he did not understand Latin, and giving up the name of the printer from whom he obtained it and the name of the author, the rule was discharged.

R. v. *Wiatt* (1722), 8 Mod. 123.

The defendant was a bookseller, who published a seditious libel written by the Rev. Gilbert Wakefield ; he was convicted, but filed an affidavit in mitigation of punishment that he had no knowledge whatever of the nature of the book or its contents ; he was accordingly discharged on payment of a fine of thirty marks. The Rev. Gilbert Wakefield was sentenced to two years' imprisonment.

R. v. *Cuthell* (1799), 27 Howell's St. Tr. 642.

There appeared in *Mist's Weekly Journal* an account professedly of certain intrigues, &c., at the Persian Court : but any reader of ordinary intelligence could see that it was the English Court that the author really meant, that the Sultan "Esreff" was intended for George II., his father the late Sultan "Merewits" for George I., "Sophi" for the Pretender, &c. &c. The two compositors who set it up divided the work between them, one taking one column, the other the next. It was almost impossible that thus they could gain any notion of the general sense of what they were printing. Yet one of them was convicted of publishing a seditious libel ; and so was the servant whose business "was only to clap down the press."

R. v. *Knell* (1728), 1 Barnard. 305.

R. v. *Clerk*, *ib.* 304.

In Massachusetts it has been held that the publisher of a newspaper is not liable for publishing an article which he reasonably and *bonâ fide* believes to be a fancy sketch or a fictitious narrative, in no way applicable to any living person ; although the writer intended it to be libellous of the plaintiff. [Probably this would be a defence in England in a criminal case, if not in a civil action. See Precedent No. 33, p. 638.]

Smith v. *Ashley* (1846), 52 Mass. (11 Met.) 367.

Dexter v. *Spear*, 4 Mason, 115.

See *Chubb* v. *Flannagan*, 6 C. & P. 431.

Rev. Samuel Paine sent his servant to his study for a certain paper which he wished to show Brereton ; the servant by mistake brought a libellous epitaph on Queen Mary which Paine inadvertently handed to Brereton. This would probably be deemed a sufficient publication in a civil case (note to *Mayne* v. *Fletcher*, 4 Man. & Ry. 312), but was held insufficient in a criminal case.

R. v. *Paine* (1695), 5 Mod. 167.

See the remarks of Lord Kenyon in *R.* v. *Lord Abingdon*, 1 Esp. 228.

A libel appeared in the *Man of the World* of May 11th. On May 25th the defendant was appointed publisher of the paper and the back-stock was sent to [*436] his office. On December 13th, the relator's agent applied at the defendant's office for a copy of the number of May 11th, and the defendant told his assistant to look it up and deliver it, which was done. The defendant swore that he had not examined the back numbers at all and knew nothing of the libel. The Lord Chief Justice intimated that in those circumstances no jury would ever find the defendant guilty of criminally publishing the libel.

R. v. *Barnard, Ex parte Lord Ronald Gower*, 43 J. P. 127.

The defendant and Mrs. Besant carried on business as publishers at 22, Stonecutter Street, the defendant being rated as the occupier of those premises. Ramsey was their manager. They at first published two papers, the *National Reformer* and the *Freethinker*; but in 1881 they arranged with Ramsey that, in addition to managing their business, he might also carry on a publishing business of his own on their premises, and Ramsey's salary was reduced in consequence of this arrangement. In November, 1881, the defendant was registered as proprietor of the *National Reformer* and Ramsey as proprietor of the *Freethinker*. In 1882 copies of the *Freethinker*, containing blasphemous libels, were purchased at 22, Stonecutter Street from a shopman in the employ of the defendant and Mrs. Besant. The defendant knew that the *Freethinker* was still being published and sold on his premises, but did not know anything as to the contents of the numbers in question. *Held*, by Lord Coleridge, C. J., that the defendant was *primâ facie* liable, but that on the above facts the jury might acquit him under sect. 7 of Lord Campbell's Act. Verdict, Not guilty.

R. v. *Bradlaugh and others*, 15 Cox, C. C. 217.

And see *R.* v. *Ramsey and Foote*, 15 Cox, C. C. 231; 48 L. T. 734; 1 C. & E. 132.

Privilege.

A defendant on the trial of any information or indictment may give evidence to show that the alleged libel was privileged by reason of the occasion; and, unless such privilege be absolute, the prosecutor may rebut this defence by evidence of malice, precisely as in civil cases; *ante*, cc. VIII. and IX.

Except in such cases of privilege it is quite unnecessary to prove malice in any criminal proceeding for a defamatory libel; it is enough that the defendant published that which the jury have found to be a libel. After conviction, however, the defendant is allowed to file affidavits in mitigation of punishment, showing that he honestly believed in the truth of what he wrote, and published it without malice. (*R.* v. *Sir F. Burdett*, 3 B. & Ald. 95.)

The law is otherwise in Scotland; there malice must be [*437] proved in all criminal proceedings, though it never need be in civil. (1 Hume, 342; Borthwick, 190, 195.)

Justification.

But it is in the matter of justification that the main difference lies between civil and criminal proceedings. In a civil trial, as we have seen, *ante*, p. 170, the truth of the matters charged in a libel is and always was a perfect answer to the action; the plaintiff was never allowed to recover damages for an injury done to a reputation to which he had no right. But in all criminal proceedings the truth of the libel by the common law constituted no defence.

The maxim used to be "the greater the truth the greater the libel;" meaning that the injudicious publication of the truth about A. would be more likely to provoke him to a breach of the peace than if some falsehood were invented about him, which he could easily and completely refute. Accordingly, on a criminal trial, whether of an indictment or an information, no evidence could be received of the truth of the matters charged, not even in mitigation of punishment. But now, by the 6th section of Lord Campbell's Act (6 & 7 Vict. c. 96), "On the trial of any indictment or information for a defamatory libel, the defendant having pleaded such plea as hereinafter mentioned, the truth of the matters charged may be inquired into, but shall not amount to a defence, unless it was for the public benefit that the said matters charged should be published. To entitle the defendant to give evidence of the truth of such matters charged as a defence to such indictment or information, it shall be necessary for the defendant, in pleading to the said indictment or information, to allege the truth of said matters charged in the manner now required in pleading a justification to an action for defamation, and further to allege that it was for the public benefit that the said matters charged should [* 438] be published, and the particular fact or facts by reason whereof it was for the public benefit that the said matters charged should be published; to which plea the prosecutor shall be at liberty to reply generally, denying the whole thereof. If after such plea the defendant shall be convicted on such indictment or information, it shall be competent to the Court, in pronouncing sentence, to consider whether the guilt of the defendant is aggravated or mitigated by the said plea and by the evidence given to prove or disprove the same: Provided always, that the truth of the matters charged in the alleged libel complained of by such indictment or information shall in no case be inquired into without such plea of justification: Provided also, that, in addition to such plea, it shall be competent to the said defendant to plead a plea of not guilty: Provided also, that nothing in this Act contained shall take away or prejudice any defence under the plea of not guilty which it is now competent to the defendant to make under such plea to any action or indictment, or information for defamatory words or libel.

And here note that there is still a most important distinction between civil and criminal cases on this point. The mere truth is an answer to a civil action, however maliciously and unnecessarily the words were published. But in a criminal case, the defendant has to prove, not only that his assertions are true, but also that it was for the public benefit that they should be published. Moreover, the statute does not apply in cases of blasphemous, obscene, or seditious words. (*R.* v. *Duffy*, 9 Ir. L. R. 329; 2 Cox, C. C. 45; *Ex parte O'Brien*, 12 L. R. Ir. 29; 15 Cox, C. C. 180.) It does not apply, by its express terms, unless there be a special plea of justification. In short, the truth of the matter complained of "can only become a defence under the statute, and then only when the statutory conditions are complied with." Wherever the Act does not apply, the law remains still as it was settled prior to that

Act. Hence a magistrate at the preliminary investigation of a charge of libel, whether under s. 5 of the 6 & 7 Vict. c. 96, or at common law, has [* 439] no power to receive or perpetuate any evidence of the truth of the matters charged (*R.* v. *Townsend*, 4 F. & F. 1089; 10 Cox, C. C. 356 ; *R.* v. *Sir Robert Carden*, 5 Q. B. D. 1 ; 49 L. J. M. C. 1 ; 28 W. R. 133 ; 41 L. T. 504 ; 14 Cox, C. C. 359), unless the libel appeared in a newspaper, as to which see s. 4 of the Newspaper Libel Act, 1881, *ante*, p. 384.

[*440] # CHAPTER XVI.

BLASPHEMOUS WORDS.

It is a misdemeanour, punishable by indictment and by criminal information, to speak or write and publish, any profane words vilifying or ridiculing God, Jesus Christ, the Holy Ghost, the Old or New Testament, or Christianity in general, with intent to shock and insult believers, or to pervert or mislead the ignorant and unwary. This is the crime of blasphemy, and on conviction thereof the blasphemer may be sentenced to fine and imprisonment to any extent, in the discretion of the Court. Formerly he was frequently also sentenced to the pillory or to banishment.* He may also be required to give security for his good behaviour for any reasonable time after he comes out of prison; and can be detained in prison till such sureties be found. [Thomas Emlyn, in 1703, and Richard Carlile, in 1820, were condemned to find sureties for their good behaviour throughout the remainder of their lives.] Also under the 60 Geo. III. & 1 Geo. IV. c. 8, s. 1 the Court [*441] may, after conviction, make an order for the seizure of copies of the blasphemous libel in the possession of the prisoner, or in the possession of any person to his use. (See the Statute in Appendix D. *post*, p. 712.) The defendant cannot plead a justification: nor can he be permitted at the trial to argue that his blasphemous libel is true. Per Abbott, L. C. J., in *Cooke* v. *Hughes*, R. & M. 115.

The intent to shock and insult believers, or to pervert or mislead the ignorant and unwary, is an essential element in the crime. *Actus non facit reum, nisi mens sit rea.* The existence of such an intent is a question of fact for the jury, and the *onus* of proving it lies on the prosecution. The best evidence of such an intention is usually to be found in the work itself. If it is full of scurrilous and opprobrious language, if sacred subjects are treated with offensive levity, if indiscriminate abuse is employed instead of argument, then a malicious design to wound the religious feelings of others may be readily inferred. If, however, the author abstains from ribaldry and licentious reproach, a similar design may still perhaps be

* In Scotland up till the year 1813 blasphemy was in certain circumstances a capital offence. The only person executed for blasphemy appears to have been Thomas Aikenhead, a young student just twenty years of age, and the son of a surgeon in Edinburgh; he seems to have been very harshly, if not illegally, treated; no counsel appeared for him: his crime consisted in loose talk about Ezra and Mahomet and in crude anticipations of Materialism. He was hanged on January 8th, 1697, buried beneath the gallows, and all his moveables forfeited to the Crown. (See Maclaurin's Crim. Cases, 12; 3 Mer. 382, n.) Two other persons were prosecuted—Kinninmouth and Borthwick—but neither was convicted; in the first case the prosecution dropped, while Borthwick fled the country. (Hume on Crimes, II. 518.)

inferred if it be found that he has deliberately had resort to sophistical arguments, that he has wilfully misrepresented facts within his knowledge, or has indulged in sneers and sarcasms against all that is good and noble; for then it is clear that he does not write from conscientious conviction, but desires to pervert and mislead the ignorant; or at all events that he is criminally indifferent to the distinctions between right and wrong. But where the work is free from all offensive levity, abuse and sophistry, and is in fact the honest and temperate expression of religious opinions conscientiously held and avowed, the author is entitled to be acquitted, for his work is not a blasphemous libel.

"It is, indeed, still blasphemy," says Mr. Justice Erskine in *Shore* v. *Wilson*, 9 Clark & Fin., at pp. 524-5, "punishment at common law, scoffingly or irreverently to ridicule or impugn the doctrines of the Christian faith; yet any [*442] man may, without subjecting himself to any penal consequences, soberly and reverently examine and question the truth of those doctrines which have been assumed as essential to it." Mr. Justice Coleridge said, in the same case, 9 Clark & Fin., at p. 539, "I apprehend that there is nothing unlawful at common law in reverently denying doctrines parcel of Christianity, however fundamental. It would be difficult to draw a line in such matters according to perfect orthodoxy, or to define how far one might depart from it in believing or teaching without offending the law. The only safe and, as it seems to me, practical rule, is that which I have pointed at, and which depends on the sobriety, and reverence, and seriousness with which the teaching or believing, however erroneous, are maintained."

And mere vehemence or even virulence of argument must not be taken as evidence of this intent to injure. Sarcasm and ridicule are fair weapons, even in heterodox hands, so long as they do not degenerate into profane scoffing or irreverent levity. "If the decencies of controversy are observed, even the fundamentals of religion may be attacked without a person being guilty of blasphemous libel." (Per Lord Coleridge, C. J., in *R.* v. *Ramsey and Foote*, 48 L. T. 739; 15 Cox, C. C. 231; 1 C. & E. 146; *post*, p. 701.)

It is not blasphemy, then, to seriously and reverently propound any opinions, however heretical, which are conscientiously entertained by the accused. Honest error is no crime in this country, so long as its advocacy be rational and dispassionate, and do not degenerate into fanatical abuse, or into scurrilous attacks upon individuals. Heresy and blasphemy are entirely distinct and different things. "The law visits not the honest errors, but the malice of mankind." ("Starkie on Libel," 2nd edition, p. 147.) "Every man may fearlessly advance any new doctrines, provided he does so with proper respect to the religion and government of the country." (Per Best, J., in *R.* v. *Burdett* (1820), 4 B. & Ald. 132.)

[*443] Or, to quote the words of Lord Mansfield in the great case of *Evans* v. *The Chamberlain of London* (1767), "The common law of England, which is only common reason or usage, knows of no prosecution for mere opinions." (16 Parl. History (1813), p. 325; 2 Burn, Eccl Law, 218.).

Illustrations.

Taylor was convicted of uttering disgusting and scurrilous language about Jesus Christ in the market-place at Guildford (see *post*, p. 451).

R. v. *Taylor*, Ventris, 293; 3 Keble, 607; Tremayne's Entries, 226.

It is blasphemy to write and publish that Jesus Christ is an impostor, the Christian religion a mere fable, and those who believe in it infidels to God.

R. v. *Eaton*, 31 Howell's St. Tr. 927.

It is blasphemy to write and publish that Jesus Christ was an impostor, a murderer in principle, and a fanatic. Such words would be libellous of whomsoever written, and the jury also had found as a fact that the intention of the prisoner was malicious; and the Court on motion refused to arrest the judgment.

R. v. *Waddington*, 1 B. & C. 26.

A publication which denies the divinity of Jesus Christ is not a blasphemous libel, if written in a reverent and temperate tone, and expressing the conscientious convictions of the author.

Shore and others v. *Wilson and others* (1842), 9 Clark & F. 355.

Edward Elwall was indicted before Mr. Justice Denton for a book alleged to be blasphemous, entitled "A True Testimony for God and for His Sacred Law; being a plain, honest defence of the First Commandment of God against all Trinitarians under Heaven, Thou shalt have no other gods but me." He was acquitted, though he admitted publication.

R. v. *Elwall*, Gloucester Summer Assizes, 1726.

To write and publish that the Christian miracles were not to be taken in a literal but in an allegorical sense was held blasphemous in 1729; but there the Court clearly considered that to attack the miracles was to attack Christianity in general, and could not be included amongst "disputes between learned men upon particular controverted points." "I would have it taken notice of," says Lord Raymond, C. J., "that we do not meddle with any differences of opinion, and that we interpose only where the very root of Christianity is struck at."

R. v. *Woolston*, 2 Str. 834; Fitz. 66; 1 Barnard. 162.

To deliver a lecture publicly maintaining that the character of Christ is defective, and his teaching misleading, and that the Bible is no more inspired than any other book, was held blasphemy by the Court of Exchequer in a civil case without any regard to the style of the lecture, or the religious convictions of the lecturer.

Cowan v. *Milbourn*, L. R. 2 Ex. 230; 36 L. J. Ex. 124; 15 W. R. 750; 16 L. T. 290.

It was held blasphemy to publish or sell Paine's "Age of Reason."

R. v. *Williams* (1797), 26 Howell's St. Tr. 656.

R. v. *Richard Carlile* (1819), 3 B. & Ald. 161; 1 Chit. 451.

[*444] Richard Carlile on his trial read over to the jury the whole of Paine's "Age of Reason," for selling which he was indicted. After his conviction, his wife published a full, true, and accurate account of his trial, entitled "The Mock Trial of Mr. Carlile," and in so doing republished the whole of the "Age of Reason," as a part of the proceedings at the trial. *Held*, that the privilege usually attaching to fair reports of judicial proceedings did not extend to such a colourable reproduction of a book adjudged to be blasphemous; and that it is unlawful to publish even a correct account of the proceedings in a court of justice, if such an account contain matter of a scandalous, blasphemous, or indecent nature.

R. v. *Mary Carlile* (1819), 3 B. &. Ald. 167.

See also *Steele* v. *Brannan*, L. R. 7 C. P. 261; 41 L. J. M. C. 85; 20 W. R. 607; 26 L. T. 509; *post*, p. 475.

Richard Carlile was sentenced to pay a fine of £1,500, to be imprisoned for three years, and to find sureties for his good behaviour for the term of his life. He was still in Dorchester Gaol in 1825. In the meantime the sale of heterodox books continued at his shop, and his shopmen were sentenced to various terms of imprisonment. In June, 1824, William Campion, John Clarke, William Maley, and Thomas Perry were sentenced to imprisonment in Newgate for three years, Richard Hassell for two years, and Thomas Jeffryes for a year and a half. for selling blasphemous publications.

An information was filed against Jacob Ilive for publishing a profane and blasphemous libel, tending to vilify and subvert the Christian religion, and to blaspheme our Saviour Jesus Christ, to cause his Divinity to be denied, to represent him as an impostor; to scandalize, ridicule, and bring into contempt his most holy life and doctrine; and to cause the truth of the Christian religion to be disbelieved and totally rejected, by representing the same as spurious and chimerical, and a piece of forgery and priestcraft.

R. v. *Ilive* (1756), Dig. L. L. 83.

An information was exhibited against Peter Annet for a certain malignant, profane, and blasphemous libel, intituled "The Free Inquirer," tending to blaspheme Almighty God, and to ridicule, traduce, and discredit his Holy Scriptures, particularly the Pentateuch, and to represent, and to cause it to be believed, that the prophet Moses was an impostor, and that the sacred truths and miracles recorded and set forth in the Pentateuch were impositions and false inventions; and thereby to diffuse and propagate irreligious and diabolical opinions in the minds of his Majesty's subjects, and to shake the foundations of the Christian religion, and of the civil and ecclesiastical government established in this kingdom. To this information he pleaded guilty. "In consideration of which, and of his poverty, of his having confessed his errors in an affidavit, and of his being seventy years old, and some symptoms of wildness that appeared on his inspection in Court, the Court declared they had mitigated their intended sentence to the following, viz. to be imprisoned in Newgate for a month; to stand twice in the pillory, with a paper on his forehead, inscribed *blasphemy;* to be sent to the house of correction to hard labour for a year; to pay a fine of 6*s.* 8*d.*, and to find security, himself in 100*l.* and two sureties in 50*l.* each, for his good behaviour during life."

R. v. *Peter Annet* (1763), 1 Wm. Bl. 395; 3 Burn, Eccl. Law, 9th ed. 386.

[* 445] An information was exhibited against John Wilkes for publishing an obscene and impious libel, tending to vitiate and corrupt the minds and manners of his Majesty's subjects; to introduce a total contempt of religion, modesty, and virtue; to blaspheme Almighty God; and to ridicule our Saviour and the Christian religion.

R. v. *Wilkes* (1763), 4 Burr. 2527; 2 Wils. 151.

In 1817 Mr. Wright, of Liverpool, was prosecuted at common law for denying the existence of a future life; but the prosecution was abandoned.

R. v. *Wright*, 3 Mer. 386, n.

In the same year William Hone was tried on three successive days, December 18th, 19th, and 20th, 1817, for publishing three parodies on the Catechism, the Litany, and the Athanasian Creed, before Abbott, J., on the first day, and Lord Ellenborough, C. J., on the other two. He was on each occasion acquitted, the libels being political attacks on the Government, and not written with any intent of ridiculing the compositions parodied.

"The Three Trials of William Hone," London, 1818.

Reflections on the Old Testament may amount to blasphemy.

R. v. *Hetherington* (1841), 5 Jur. 529.

Queen Mab was found by a jury in 1841 to be a blasphemous libel.

R. v. *Moxon*, 2 Mod. St. Tr. 356.

But this prosecution was a purely vindictive one by Hetherington, and no sentence was ever passed. Blackburn, J., expresses his disapproval of their finding in

R. v. *Hicklin*, L. R. 3 Q. B. 374; 37 L. J. M. C. 89; 16 W. R. 803; 11 Cox, C. C. 19; 18 L. T. 395.

Southwell was convicted of blasphemy in January, 1842, for publishing the "Oracle of Reason."

Later in the same year Adams was tried before Mr. Justice Erskine at Gloucester Assizes for selling No. 25 of the said "Oracle of Reason," and convicted.

At the same Assizes George Jacob Holyoake was tried before Mr. Justice Erskine for oral blasphemy. It appeared that he had been lecturing on emigration and the poor laws, and at the close a man, said to have been sent on purpose to entrap him, rose and said: "The lecturer has been speaking of our duty to man, has he nothing to tell us as to our duty to God?" Holyoake,

being thus challenged, replied, "I do not believe there is such a thing as a God. . . . I would have the Deity served as they serve the subalterns—place him on half-pay." But Holyoake was known to be a friend of Southwell's, and a writer in the "Oracle of Reason," and he was convicted and sentenced to six months' imprisonment.

See *Trial of Holyoake*, London, 1842.

Father Vladimir Petcherini, a monk, was indicted in Ireland in 1855 for having contemptuously, irreverently, and blasphemously burnt a Bible in public with intent to bring the same into disregard, hatred, and contempt, and in other counts with intent to bring religion into discredit, and in other counts with having caused and procured it to be burnt with such intents. There was some evidence that a Bible had been burnt in the defendant's presence among a heap of other books and papers, but very little that he knew it or sanctioned it. Greene, B., directed the jury that if he sanctioned it, it would follow "as of [* 446] course that the intention of the act could only be to bring into contempt the authorized version of the Holy Scriptures." The defendant was acquitted.

Reg. v. *Petcherini*, 7 Cox, C. C. 79.

A man called Pooley was indicted at the Bodmin Summer Assizes, July, 1857, before Coleridge, J., his son, the present Lord Coleridge, C. J., being counsel for the prosecution. The prisoner had scribbled on a gate some disgusting language concerning Jesus Christ, and was convicted of a blasphemous libel, but was subsequently discovered to be insane.

R. v. *Pooley*, Digest of Criminal Law, 97.

In November, 1868, John Thompson was committed for trial by the Southampton magistrates on the prosecution of the Rev. Arthur Bradley, the incumbent of a church there, for publishing the following blasphemous libel:—"I believe Jesus of Nazareth to be the Messiah at his first coming, as an antitypical Paschal Lamb who died for sins in allegory; and I believe John Cochran of Glasgow to be the Messiah at his second coming, and the antitypical High Priest who has taken away sin in reality." In March, 1869, the Grand Jury ignored the bill.

Foote, Ramsey, and Kemp were indicted for blasphemous libels and pictures contained in the Christmas number of the "Freethinker;" Foote being the editor, Ramsey the registered proprietor, and Kemp the printer and publisher of that paper. On the first trial, March 1st, 1883, the jury could not agree, and were discharged. The prisoners were tried again on Monday, March 5th, 1883, and convicted and sentenced to twelve, nine, and three months' imprisonment respectively. North, J., directed the jury that any publication containing "contumelious reproach or profane scoffing against Holy Scripture and the Christian religion" was a blasphemous libel.

R. v. *Foote, Ramsey, and Kemp*, Times for March 2nd and 6th, 1883.

In the same year Ramsey and Foote were indicted for articles which had appeared in other numbers of the "Freethinker," which were alleged to be blasphemous. Mr. Bradlaugh, M.P., was at first included also in this indictment, but the case against him was tried separately, and he was acquitted on the ground that he was in no way responsible for the publication. See 15 Cox, C. C. 217; *ante*, p. 436. Ramsey and Foote were tried before Lord Coleridge, C. J., on April 24th, 1883; his Lordship's summing up will be found printed *in extenso* in Appendix B., *post*, p. 688. The jury could not agree upon a verdict, and on Tuesday, May 1st, the Attorney-General issued his *fiat* for a *nolle prosequi*.

R. v. *Ramsey and Foote*, 48 L. T. 733; 15 Cox, C. C. 231; 1 C. & E. 126.

For other cases of blasphemy at common law, see

Traske's Case (1618), Hobart, 326; *post*, p. 450.

R. v. *Atwood* (1618), Cro Jac. 421; 2 Roll. Abr. 78; *post*, p. 450.

R. v. *Clendon* (1712), cited, 2 Str. 789.

R. v. *Hall* (1721), 1 Str. 416.

Paterson's Case (1843), 1 Brown (Scotch), 629.

Robinson's Case (1843), *ib.* 643.

Heresy and blasphemy are entirely distinct and different things, both in their essence and in their legal aspect. Originally [*447] both were ecclesiastical offences not cognizable in the secular courts. Then statutes were passed under which both became *crimes* punishable in the ordinary law courts. Now heresy is once more a purely ecclesiastical offence, punishable only in the clergy; while blasphemy is the technical name for a particular offence against the state.

Heresy (*αἵρεσις*, from *αἱρέομαι*, I choose for myself) is the deliberate selection and adoption of a particular set of views or opinions, which the majority consider erroneous. To persist in the tenet of your choice after its error and its injurious tendency have been pointed out to you was regarded as a sin, and the obstinate heretic who refused to recant was bidden to do penance for the good of his soul. Blasphemy, on the other hand, is a crime against the peace and good order of society; it is an outrage on men's religious feelings, tending to a breach of the peace. The word necessarily involves an intent to do harm or to wound the feelings of others, for it is derived from *βλάπτω*, I hurt, and *φημί*, I speak, and denotes, therefore, "speaking so as to hurt."

Heresy.

At common law heresy was no crime. The secular courts took no cognizance of any man's religious opinions; and indeed before the days of Wiclif heretics were scarce. Towards the end of the fourteenth century, however, heresy came to be regarded as a crime punishable with death, and acts were passed in the reigns of Henry IV. and Henry V., which condemned all heretics to be burnt alive and gave the clergy the power of defining heresy just as they pleased. This state of things lasted till the reign of Henry VIII., when the law was rendered in some particulars less severe. Under Edward VI. there were but two executions for heresy. Mary restored the old system for a short period, during which about 300 persons were burnt.

But by the 1 Eliz. c. 1, s. 6, all statutes relating to heresy were repealed, though somehow two men were burnt in her reign, and two under James I. "At this day," says Sir Edward Coke, "no person can be indicted or impeached for heresy before any temporal judge, or other that hath temporal jurisdiction." (12 Rep. 57.) By the 29 Car. II. c. 9, s. 1, the writ *de hæretico comburendo* was abolished; but s. 2 of the same act expressly provides "that nothing in this act shall extend, or be construed to take away or abridge the jurisdiction of Protestant archbishops or bishops, or any other judges of any ecclesiastical courts, in cases of atheism, blasphemy, heresy, or schism, and other damnable doctrines and opinions, but that they may proceed to [*448] punish the same according to His Majesty's ecclesiastical laws, by excommunication, deprivation, degradation, and other ecclesiastical censures, not extending to death, in such sort, and no other, as they might have done before the making of this act, anything in this law contained to the contrary in anywise notwithstanding." By the 53 Geo. III. c. 127, s. 3, it is enacted that "no person

who shall be pronounced or declared excommunicate shall incur any civil penalty or incapacity whatever, in consequence of such excommunication, save such imprisonment, not exceeding six months, as the court pronouncing or declaring such person excommunicate shall direct."

These enactments are obsolete ; but they were better repealed. I do not know that any layman has been prosecuted for heresy since 1640. And indeed there is considerable authority for holding that at the present day the ecclesiastical courts no longer possess any criminal jurisdiction over laymen. In *Burder v.* ———, 3 Curteis, 827, May 31st, 1844, Sir H. Jenner Fust says : "As against laymen, whatever may be the nature of the charge, undoubtedly the court has no jurisdiction to entertain a criminal suit." And though four years earlier a criminal suit was commenced against a layman for an incestuous marriage, Dr. Lushington contented himself with pronouncing the marriage null and void, which was clearly within his power, and did not impose any punishment or penance on the defendant. (*Woods* v. *Woods*, 2 Curt. 516, July 18th, 1840) and in *Phillimore* v. *Machon*, 1 P D. 481, Lord Penzance says : "Speaking generally, and setting aside for the moment all questions as to the clergy, it cannot, I think, be doubted that a recurrence to the punishment of the laity for the good of their souls by ecclesiastical courts, would not be in harmony with modern ideas, or the position which ecclesiastical authority now occupies in the country. Nor do I think that the enforcement of such powers, where they still exist, *if they do exist*, is likely to benefit the community."

This much is quite clear at all events—that no ecclesiastical court can any longer proceed against a layman for mere *nonconformity*. By the 4th section of the Toleration Act (1 William and Mary c. 18), no dissenter shall be prosecuted in any ecclesiastical court for or by reason of his nonconformity to the Church of England. And although by s. 17 it was provided that the benefits of the act should not extend to Unitarians, this exception was repealed in 1813 by the statute 53 Geo. III. c. 160. With respect to dissenting ministers, however, one relic of the past still lingers. By s. 5 of 52 Geo. III. c. 155, any justice of the peace may call on the minister of "any place of religious worship certified" under that act to make a declaration to the following [*449] effect :—"I am a Christian and a Protestant, and as such, I believe that the Scriptures of the Old and New Testament contain the revealed will of God, and I receive the same as the rule of my doctrine and practice." It is improbable that any justice of the peace is aware at the present moment that he possesses this power, still less probable is it that he would ever exercise it. The section applies only to ministers of chapels certified under the 53 Geo. III. c. 155, and very few, if any, dissenting chapels are certified under that Act : they are all, I believe, "registered" under the more recent and comprehensive Act, 18 & 19 Vict. c. 81, an Act which applies to Jews, Roman Catholics and every other denomination, and which requires no declaration of any kind. Still it is wrong that a justice of the peace should have the power to impose such a test on any one, and the section should be repealed forthwith.

Even over clergymen of the Established Church the power of the Ecclesiastical Courts has been greatly restricted by the judgment of Her Majesty's Privy Council (including the Archbishop of Canterbury), in the case of the Rev. Rowland Williams, February 8, 1864, which decided that it is not an ecclesiastical offence, even for the clergy, to dispute the dates and authorship of the several Books of the Old and New Testaments, to deny that the whole of the Holy Scriptures was written under the inspiration of the Holy Spirit, to reject parts of Scripture upon their own opinion that the narrative is inherently incredible, to disregard precepts in Holy Writ because they think them evidently wrong, so long as they do not contradict any doctrine laid down in the Articles or Formularies of the Church of England. (*Williams* v. *Bishop of Salisbury*, *Wilson* v. *Fendall* (1864), 2 Moore, P. C. (N. S.) 375; Brodrick & Fremantle, 247; *Gorham* v. *Bishop of Exeter* (1850) *ib.* 64.

It must, moreover, be pointed out, before leaving the Ecclesiastical Courts, that no blasphemous publication, which is punishable in the secular courts, can posibly be taken cognizance of in the ecclesiastical. For "where the common or statute law giveth remedy *in foro seculari* (whether the matter be temporal or spiritual) the conusance of that cause belongeth to the King's temporal Court only." (Coke upon Littleton, 96 b., and see *Phillimore* v. *Machon*, 1 P. D. 481.) Hence it is only over blasphemous libels *not* punishable by the common law or under any statute that the Ecclesiastical Courts can have any jurisdiction at all. (*Curl's case*, 2 Strange, 89; 1 Barnard. 29.) The canon law, speaking generally, is not binding, at all events on laymen. "The canon law forms no part of the law of England, unless it has been brought into use and acted upon in this country: [* 450] the burden of proving which rests on those who affirm the adoption of any portion of it in England." (Lord Denman, C. J., in *The Queen* v. *The Archbishop of Canterbury*, 12 Q. B. 49; 17 L. J. Q. B. 268; *Middleton* v. *Croft*, Cas. temp. Hardwicke, 57, 326. See Year Book, 34 Hen. VI., fo. 38 (1459); Prisot, c. 5; Fitch. Abr. quare imp. 89; Bro. Abr. qu. imp. 12.) Hence the Ecclesiastical Courts have no concurrent criminal jurisdiction over libels; and their jurisdiction, by way of civil proceeding for defamation, is expressly taken away by the 18 & 19 Vict. c. 41, s. 1.

Blasphemy.

I.

So much for the ecclesiastical offence of HERESY. We come now to the law relating to BLASPHEMY. How are the secular Courts concerned in such a matter at all?

The answer in former days was clear and obvious. The secular Courts interfered to punish blasphemous libels for the same reason as they did in the case of any other libel, viz., in order to prevent a disturbance of the peace. Blasphemous preaching and writing led to dangerous outbreaks of fanaticism, and the State had, therefore, a direct interest in their suppression.

This was the point decided in the Star Chamber, in *Traske's case* (1618), the earliest reported decision on the subject. The defendant, John Traske, was, in the words of the report, "a minister that held opinion that the Jewish Sabbath ought to be observed, and not ours, and that we ought to abstain from all manner of swine's flesh. Being examined upon these things, he confessed that he had divulged these opinions, and had laboured to bring as many to his opinion as he could. And had also written a letter to the king, wherein he did seem to tax his majesty of hypocrisy, and did expressly inveigh against the Bishops High Commissioners, as bloody and cruel in their proceedings against him, and a Papal Clergy. Now he, being called *ore tenus*, was sentenced to fine and imprisonment, not for holding those opinions (for those were examinable in the Ecclesiastical Courts and not here), but for making of conventicles and factions by that means, which may tend to sedition and commotion, and for scandalizing the king, the bishops and the clergy." (Hobart's Reports, 236.)

In the same year (1618) there was a similar decision in the King's Bench, in *Atwood's case*, Cro. Jac. 421 ; 2 Roll. Abr. 78. The language complained of in that case sounds to us now very harmless ; it was aimed chiefly at the prevailing mode of worship :—"The [* 451] religion now professed is but fifty years old : preaching is but prating ; prayer once a day is more edifying." The Court at first (in Easter Term) doubted if they had jurisdiction, as the words did not clearly tend to a breach of the peace. The Attorney-General, Sir Henry Yelverton, thought the case ought to go before the Ecclesiastical Court of High Commission. (Croke, Jac. 421.) But the King's Bench in Michaelmas Term decided that the indictment lay ; "for these words are seditious words against the State of our Church and against the peace of the Realm, and although they are spiritual words, still they draw after them a temporal consequence, —viz., the disturbance of the peace." (2 Roll's Abridgment, 78.)

The next decision that we have on the subject is *R.* v. *Taylor* (1676), 1 Ventr. 293 ; 3 Keble, 607, 621 ; Tremayne's Entries, p. 226. This case contains the celebrated *dictum* of Sir Matthew Hale, that "Christianity is parcel of the laws of England," a phrase that is very often quoted, and has, I think, been misunderstood. Let us first look at the facts of the case which was before him, for it is most unfair to learned judges to seize on one line of a judgment, force it from its context, and treat it as a general proposition of abstract law to be pushed to all extremes.

Taylor was proved to have preached aloud and persistently in the market-place at Guildford words of which the following are a sample :—"Christ is a Whoremaster, and Religion is a Cheat, and Profession is a Cloak, and they are both cheats. . . . All the Earth is mine, and I am a King's Son ; my Father sent me hither, and made me a Fisherman to take Vipers, and I neither fear God, Devil nor Man ; I am a Younger Brother to Christ, an Angel of God. . . . No Man fears God but an Hypocrite. . . . Christ is a Bastard. . . . God damn and confound all your Gods," &c. The information, which is set out in full in Tremayne's Entries, p.

226, alleged, among other things, that these words tended to destroy Christian government and society. It was no doubt argued on behalf of Taylor, as it was in the earlier case of Atwood, that the offence was punishable only in the spiritual Court. But "Hale said that such kind of wicked, blasphemous words were not only an offence to God and religion, but a crime against the laws, state, and government, and therefore punishable in this Court; for to say Religion is a cheat is to dissolve all those obligations whereby the civil societies are preserved; and Christianity is parcel of the laws of England, and therefore to reproach the Christian religion is to speak in subversion of the law." Or, as the judgment is more briefly given in the report in 3 Keble, at [*452] p. 607 :—"Hale, C. J. These words, though of ecclesiastical cognizance, yet that 'Religion is a cheat,' tends to dissolution of all government, and therefore punishable here, and so of contumelious reproaches of God or the Religion established."

When we consider the date at which this judgment was delivered (1676), and remember how mighty a part religious fanaticism had played in the social disturbances of the earlier part of the century, it cannot, I think, be said that the decision in *Taylor's case* was wrong either in fact or in law. The concluding sentence, as reported in Ventris, is undoubtedly too wide. It should have been limited (and probably was by the Chief Justice) to "*such* kind of blasphemous words" as the prisoner was charged with uttering. The earlier part of the judgment is expressly so limited.

Yet the *dictum* at the end of the judgment of Hale, C. J., in Ventris' Report, has constantly been misconstrued into a general and abstract proposition of law, as though the Chief Justice had said, in syllogistic form,—

"To disparage any part of the law of England is a crime.

"Christianity is a part of the law of England.

"Therefore to disparage Christianity is a crime."

But Hale, C. J., would himself have been the first to deny the major premiss. "For," as the Commissioners on Criminal Law remarked in their Sixth Report (May 3, 1841, p. 83), "It is not criminal to speak or write either against the common law of England generally, or against particular portions of it, provided it be not done in such a manner as to endanger the public peace by exciting forcible resistance." See also Jefferson's Letter to Major Cartwright, published in Cartwright's Life and Correspondence. It is a fact, no doubt, that Christianity is the religion of the church which is by law established in this land; but it does not follow that to attack Christianity in peaceable and temperate language is or ever was a crime. All that the Court intended to decide in *Taylor's case* was simply this :—"These words are not only a sin; they are also a crime. They are punishable in a temporal Court: for they tend to subvert the established order of things, of which Christianity is a part, and are therefore dangerous to the State. They are in fact seditious." And as though to make the grounds of their decision clear beyond all doubt the Court condemned Taylor, as part of his punishment, to stand in the pillory, both at Westminster

Palace-yard and also at Guildford where he spoke the words, with a paper fixed to his head with these words written on it in large letters :—"For Blasphemous Words tending to the Subversion of all Government." (Tremayne, 226 ; 3 Keble, 621.)

[* 453] This, then, is the first stage in the development of our law of libel. The State steps in to suppress harangues which endanger the peace and good order of society. The substance or matter of the harangue is comparatively immaterial ; the "secular arm" is only concerned with its political consequences.

To one charge, therefore, which has been brought against our law as to blasphemy, it is not amenable, at all events in this its earliest form. It does not "take the Deity under its protection." It does not attempt to "avenge the insult done to God." The offender is punished for his offence against his fellow-men, not for his offence against God. No judge and jury ever tried a man for a *sin* that was not also a *crime*. As Erskine, J., said, in sentencing Holyoake in 1842, "The arm of the law is not stretched out to protect the character of the Almighty ; we do not assume to be the protectors of our God, but to protect the people from such indecent language." Very similar words were spoken by Mr. Justice Ashhurst in passing sentence upon Williams, who was tried in 1797 for publishing Paine's Age of Reason :—"Although the Almighty does not stand in need of the feeble aid of mortals to vindicate His honor and law, it is, nevertheless, fit that courts of judicature should show their abhorrence and detestation of people capable of sending into the world such infamous and wicked books. Indeed, all offences of this kind are not only offences to God, but crimes against the law of the land, and are punishable as such, inasmuch as they tend to destroy those obligations whereby civil society is bound together. And it is upon this ground that the Christian religion constitutes part of the law of England." (26 Howell's State Trials, p. 714.)

So, in 1838, Alderson, B., told the jury, in *Gathercole's case*, 2 Lewin C. C. at p. 254, that "a person may, without being liable to prosecution for it, attack any sect of the Christian religion, save the established religion of the country ; and the only reason why the latter is in a different situation from the others is because it is the form established by law, and is therefore a part of the constitution of the country. In like manner and for the same reason any general attack upon Christianity is the subject of criminal prosecution, because Christianity is the established religion of the country." And he directed the jury to acquit the prisoner if they thought the libel "was merely an attack upon the Roman Catholic Church" (see *ante*, p. 424). This ruling, while it clearly states the grounds on which the law against blasphemy was supported, shows with equal clearness how one-sided was its operation.

[*454]

II.

But with the eighteenth century comes a new development in this branch of the law. In the case of *R.* v. *Woolston* (1729),

Fitz. 64 ; 1 Barnard. 162, 266 ; 2 Strange, 832, the Court of King's Bench, while professing to follow *R.* v. *Taylor*, greatly extended the principle of that decision, making criminal liability depend on the heretical character of the opinions expressed. Woolston was a Fellow of Sidney College, Cambridge, who had published six "Discourses on the Miracles of our Saviour," urging that they were not to be taken literally, but allegorically or mystically. His trenchant arguments, which were conveyed in most forcible language, gave great offence to the bishops, and Woolston was prosecuted and found guilty. The indictment against him contained an express allegation that these discourses were published "with an intent to vilify and subvert the Christian religion" (see the report in Fitzgibbon) ; hence the verdict of the jury amounted to a finding (in my opinion erroneous) that such was Woolston's intent. His counsel, Dr. Worley, moved in arrest of judgment that these discourses did not amount to a libel upon Christianity, since the Scriptures were not denied ; that the offence was of ecclesiastical cognizance ; that the defendant should have been proceeded against upon the stat. 10 William III. c. 32 ; and he was prepared to go further and argue that even though the book was a libel upon Christianity, yet the common law had not cognizance of such an offence, when he was stopped by the Court, Raymond, C. J., declaring on the authority of *Taylor's case* (1 Ventris, 293 ; 3 Keble, 607), that "Christianity in general is parcel of the common law of England, and, therefore, to be protected by it. Now whatever strikes at the very root of Christianity tends manifestly to a dissolution of the civil government. So that to say an attempt to subvert the established religion is not punishable by those laws upon which it is established is an absurdity. I would have it taken notice of that we do not meddle with any differences in opinion, and that we interpose only where the very root of Christianity itself is struck at, as it plainly is by this allegorical scheme, the New Testament, and the whole relation of the life and miracles of Christ being denied ; and who can find this allegory ?"

Similarly, in 1708, when a man called Read was indicted for publishing an obscene libel, Chief Justice Holt expressed a strong opinion that such a publication was a purely ecclesiastical offence, not punishable in the temporal courts (Fortescue, 98 ; 11 Mod. 142). But afterwards in *Curl's case* (1727) (1 Barnard. 29 ; 2 Strange, 788), [* 455] the judgment of Hale, C. J., in *Taylor's case* was cited, and the Court of King's Bench decided that an obscene libel was "punishable at common law as an offence against the peace, intending to weaken the bonds of civil society, virtue, or morality ;" the Chief Justice giving his judgment somewhat guardedly : "If it reflects on religion, virtue, or morality, if it tends to disturb the civil order of society, I think it is a temporal offence" (2 Strange, 790).

The same law was laid down in 1716 by Hawkins, in his "Pleas of the Crown," Book I. c. 5 :—"Offences of this nature, because they tend to subvert all religion and morality, which are the foundation of government, are punishable by the temporal judges

with fine and imprisonment." So in summing up to the jury in the Irish case of *R.* v. *Father Petcherini* (1855) (7 Cox, C. C. at p. 84), Greene, B., told them that there could be no doubt that the act complained of—burning a Bible in public—was "one of grave and serious nature, and amounts by the law of the land to a criminal offence. It has been truly stated to you that the Christian religion is part and parcel of the law of this land. Any publication or any conduct tending to bring Christianity or the Christian religion into disrespect, or expose it to hatred or contempt, is not only committing an offence against the majesty of God, but is in violation of the common law of the land. Among the ways in which that offence may be committed is by exposing the Word of God, or any part of it, to obloquy or hatred. The highest authorities have laid down the law in that way, both ancient and modern."

And the decision in *R.* v. *Woolston* has been followed in this generation, as recently as 1867, in a civil case, *Cowan* v. *Milbourn*, L. R. 2 Ex. 230; 36 L. J. Ex. 124; 15 W. R. 750; 16 L. T. 290, in which the Court of Exchequer decided that the defendant was justified in refusing to carry out a contract to let certain rooms, because the plaintiff proposed to deliver in them lectures, the titles of two of which were advertised as follows:—"The Character and Teachings of Christ; the former defective, the latter misleading;" "The Bible shown to be no more inspired than any other book." The action was tried in the Passage Court at Liverpool, and the Recorder directed the verdict to be entered for the defendant, but gave the plaintiff leave to move the Court of Exchequer to enter the verdict for him, the damages being contingently assessed at 10*l.* on each count. The plaintiff accordingly moved *ex parte* for a rule *nisi* in pursuance of the above leave. The lectures never were delivered, and the propositions intended to be maintained in them could hardly have been expressed on the placards in less offensive language. Yet [* 456] Kelly, C. B., held that it was clear from the advertisements that the lecturer was going to attack Christianity in general, and that to do this publicly was clearly blasphemy at common law. Baron Bramwell, on the other hand, relied on the statute 9 & 10 Will. III. c. 32, s. 1, the Recorder having elicited from the plaintiff at the trial, as appears from the report in the Law Times, that he had been educated in the Christian religion. But at the end of his judgment the learned Baron seems to abandon this ground, and to admit that possibly the lecture was not positively criminal, in the sense of being indictable, while maintaining that it still was unlawful as being *contra bonos mores*. This, no doubt, is a solid distinction in many cases; but with all respect I venture to doubt if there can be such a distinction in slander and libel. Either the words are criminal or they are innocent. The right of free speech applies the instant the veto of the law is removed: there can be no *tertium quid*, no debatable ground of language not criminal, yet reprobated by the law.

The learned Baron also remarked during the argument (16 L. T. 291), "I have heard it said by a learned judge that blasphemy is more in the manner and spirit of treating the subject than in the

actual matter itself." And Baron Martin's judgment was as follows:—"I am quite of the same opinion. I protest against the notion that this is any punishment of the persons advocating these opinions. It is merely the case of the owner of property exercising his rights over its use." Hence it cannot be said that either of these learned Barons concurred in the law laid down by the Lord Chief Baron. And the case is in other respects unsatisfactory as an authority on a point of criminal law, being a somewhat hurried decision, refusing an application for a rule *nisi* in a civil case in which only 20*l.* was in dispute.

Still, these cases, if they stood alone, would undoubtedly establish this proposition, that "whatever strikes at the very root of Christianity tends manifestly to a dissolution of the civil government," and is therefore punishable as a crime, although the language and temper of the writer be irreproachable. This proposition appears to me to be inconsistent with the law laid down in the earlier cases; it is in fact punishing a man for his opinions, which, as was held in *Traske's case* (*ante*, p. 450), were examinable only in the Ecclesiastical Courts.

What reason, then, is alleged for this extension of the former law? It is based on the maxim that "every man must be taken to have intended the natural and necessary consequences of his act." This is the argument, as I understand it:—Though the writer may honestly desire to arrive at the truth, and though he may have expressed his [* 457] objectionable arguments with no more profanity than their statement necessarily involved, still it will be the duty of both judge and jury to consider the effect of a general dissemination of those opinions. If the doctrines maintained are such that their direct tendency is to subvert religion, to destroy morality, and "to dissolve all the bonds and obligations of civil society," then the maxim applies, and the judge must direct a conviction, for the necessary malice is *presumed*.

Now every one would naturally be reluctant to construe into a crime the fair and temperate expression of opinions sincerely entertained, merely in obedience to a legal presumption. And it will be observed that the whole of the above argument rests on the assumption that the natural and necessary consequence of publishing heretical opinions is to destroy religion and morality, and to subvert the civil government.

This assumption I deny. I can understand that where a man intentionally shocks or insults the religious feelings of others he is weakening that sentiment of reverence for holy things which is a safeguard of morality: and his conduct also may conduce to a breach of the peace. But where a man honestly states in calm and temperate language and without any sophistical argument the views which he conscientiously entertains and at which he has arrived by careful and reverent study of the question, I deny that such an avowal of heretical or even atheistical opinions tends either to subvert religion, to destroy morality, or to dissolve any of the bonds and obligations of civil society.

In the first place, how can it subvert religion? *Magna est veritas et prævalebit.* The free discussion of doctrines cannot injure the sacred cause of truth. The orthodox possess at least as much learning and ability as the heretic. Let them confute his errors by fair argument. "For, if we be sure we are in the right," says Milton, in his Areopagitica (p. 65, Arber's Reprint), "and do not hold the truth guiltily, which becomes not, ... what can be more fair than when a man judicious, learned, and a conscience for aught we know as good as theirs that taught us what we know, shall openly by writing publish to the world what his opinion is, what his reasons, and wherefore that which is now taught cannot be sound." I have no fears of the results of the freest or most advanced criticism if only it be scholarly and reverential.

Next, how can it be said that the frank avowal of heretical opinions necessarily conduces to immorality. There is sometimes more immorality in the concealment of such views by those who secretly entertain them. Can it be said that Woolston led an [*458] immoral life, because he disbelieved in the literal accuracy of the Gospel narrative as to the miracles? The orthodox have no monopoly of virtue; there is no necessary connection between heresy and vice.

Lastly, how can the statement of heretical views in temperate and inoffensive language by one who conscientiously believes in the truth of what he writes or says, tend in any way "to disturb civil order and good government," or to "dissolve all the bonds and obligations of civil society." Does not a heretic pay his bills and keep his promises like any other citizen? It is the Salvation Army and the Orangemen who cause riots in our streets, not the Secularists and Agnostics. There is one argument frequently adduced in the earlier cases in favour of prosecution for blasphemy—that all attacks upon the established religion tend to destroy the solemnity of an oath "on which the due administration of justice depends," and thus "the law will be stripped of one of its principal sanctions—the dread of future punishment." But the strength of this argument is now destroyed by the Acts recently passed permitting atheists and persons who do not believe in a future life to give evidence in our law courts. (See the 1 & 2 Vict. c. 105, s. 1; 32 & 33 Vict. c. 68, s. 4; 33 & 34 Vict. c. 49, s. 1.) Atheists even sit in parliament, and make for us those very laws which are "the bonds and obligations of civil society."

I submit, therefore, that now at the end of the nineteenth century we know by practical experience that such a book as Woolston's does not in fact produce the consequences which Lord Raymond held it would. It was perhaps natural that in those days the Chief Justice should dread such result: but we have since tried universal toleration and found it highly beneficial. It is to the public interest that heretical opinions should be freely advanced and fairly answered, without unnecessary irreverence. If any man has discovered what he honestly believes to be a valuable truth, it is right that he should publish it to the world, and if he does so *bonâ fide* and in calm and temperate language, then, however mistaken he may be, his

publication is privileged, and he ought not to be punished as a libeller either in a civil or criminal court.

III.

Hence, in the nineteenth century the law against blasphemy reaches a third stage. There is no longer any danger to the State; no amount of heretical sermons would produce a revolution now; though if their tone were very offensive and aggravating, the audience might possibly assault the preacher. Nor does our law any longer interfere with men's religious opinions; no Court in England, whether secular [*459] or ecclesiastical, will now take cognizance of such matters. It is the malicious intent to insult the religious feelings of others by profanely scoffing at all they hold sacred, which deserves and receives punishment.

This view of our law against blasphemy was strongly advocated by that eminent lawyer, the late Mr. Starkie, the first edition of whose Treatise on the Law of Slander and Libel was published in 1812, the second in 1830. (See especially Vol. II., c. 6, pp. 143—147.) This is the view adopted by the judges in the House of Lords in *Shore* v. *Wilson*, 9 Cl. & Fin. 355. This is the view that has recently been stated in the admirable address of the Lord Chief Justice of England to the jury in the case of *Reg.* v. *Ramsey and Foote*, 48 L. T. 733; 15 Cox, C. C. 231; 1 C. & E. 126. This address states in the most clear and convincing language the principles that are truly to be deduced from the early authorities on the subject. It is printed *in extenso*, as revised by his Lordship, in Appendix B., *post*, p. 688. I therefore merely quote here the following passage:—"If the law, as I have laid it down to you, is correct—and I believe it has always been so—if the decencies of controversy are observed, even the fundamentals of religion may be attacked without a person being guilty of blasphemous libel. There are many great and grave writers who have attacked the foundations of Christianity. Mr. Mill undoubtedly did so; some great writers now alive have done so too; but no one can read their writings without seeing a difference between them and the incriminated publication, which I am obliged to say is a difference, not of degree, but of kind. There is a grave, an earnest, a reverent, I am almost tempted to say a religious tone in the very attacks on Christianity itself, which shows that what is aimed at is not insult to the opinions of the majority of Christians, but a real, quiet, honest pursuit of truth. If the truth at which these writers have arrived is not the truth we have been taught, and which, if we had not been taught it, we might have discovered, yet because these conclusions differ from ours, they are not to be exposed to a criminal indictment. With regard to these persons, therefore, I should say they are within the protection of the law, as I understand it."

It is no new law that the Lord Chief Justice has laid down. Precisely the same view was held by his father, Mr. Justice Coleridge, and stated to the jury in the case of *R.* v. *Pooley*, tried at Bodmin Summer Assizes in 1857. (See Sir James Stephen's Digest of the

Criminal Law, p. 97, *n.*) Mr. Justice Erskine, in sentencing Adams at Gloucester in 1842, for selling No. 25 of the *Oracle of Reason*, said :—"By the law of this country, every man has a right to express his [*460] sentiments in decent language." And in summing up in the case of *R.* v. *Holyoake*, the same learned judge told the jury :—"If you are convinced that he uttered the words with levity, for the purpose of treating with contempt the majesty of the Almighty God, he is guilty of the offence. If you think he made use of these words in the heat of argument without any such intent, you will give him the benefit of the doubt." Mr. Justice Best gave a similar direction to the jury in the case of *R.* v. *Mary Carlile* (1819) ; see State Trials (New Series), Vol. I. Lord Denman, C. J., in *Moxon's case* (2 Townsend's Modern State Trials, at p. 388), expressly directed the attention of the jury to the fact that "the purpose of the passage cited from 'Queen Mab' was, he thought, to cast reproach and insult upon what, in Christian minds, were the peculiar objects of veneration," and left to the jury these questions: —"Were the lines indicted calculated to shock the feelings of any Christian reader? Were their points of offence explained, or was their virus neutralized by any remarks in the margin, by any note of explanation or apology? If not, they were libels on God, and indictable." (June 23rd, 1841.)

And there is a long string of decisions in Chancery, bearing on the subject, which strongly support the opinion expressed by Lord Coleridge. In equity no trust will be enforced, no legacy will be held valid, the object of which is to promote an illegal or immoral act. Hence, if the doctrines advocated by a particular sect were blasphemous, a legacy or trust in favour of that sect would be set aside. It follows that where we find a legacy or trust for the dissemination of any particular doctrines upheld after argument in the Court of Chancery, those doctrines cannot be illegal or immoral and certainly are not blasphemous. It would be absurd to contend that one Division of the High Court of Justice will punish as a crime teaching which another branch of the same Court will encourage and enforce. Or, to quote the words of Lord Mansfield in *Evans' case*, already cited : "Nothing can be plainer than that the law protects nothing in that very respect, in which it is at the same time in the eye of the law a crime. (16 Parliamentary History, p. 320.)

Now, Lord Raymond would certainly have held, that to deny the Deity of Christ was "to strike at the very roots of Christianity." Yet bequests and trusts in favour of Unitarianism are always enforced in Chancery. So much of the Toleration Act as excepted persons denying the Trinity from its benefits, and so much of the Blasphemy Act of William III. as related to persons who "deny any one of the Three Persons in the Holy Trinity to be God," were repealed in 1813 by the 53 Geo. III. c. 160. Lord Eldon, in 1817, pointed out that [*461] this repeal only left the common law exactly as it was before the 9 & 10 Will. III. c. 32, was passed, and deliberately abstained from expressing any opinion as to whether the publication of Unitarian opinions was or was not an offence at common law. (*Att.-Gen.* v. *Pearson* (1817), 3 Mer. 405, 407.) At the same time, the

Lord Chancellor expressly laid down the principle at p. 399 :—"It is quite certain that I ought not to execute a trust, the object of which is illegal." But all doubt has since been set at rest. In the case of *Lady Hewley's Charities* (*Shore* v. *Wilson*, 9 Clark & Fin. 355) in the House of Lords in 1842 the question was put to the judges whether ministers and preachers of Unitarian belief and doctrine were, in the then state of the law, incapable of partaking of religious charities (p. 499); and they all (Mr. Justice Maule, Mr. Justice Erskine, Mr. Justice Coleridge, Mr. Justice Williams, Baron Gurney, Baron Parke, and Lord Chief Justice Tindal) answered this question in the negative. Mr. Justice Maule said (p. 509) :—"There is no statute now in force prohibiting the profession or preaching of Unitarian doctrines, and I have not found any authority to show that it is prohibited at common law." Mr. Justice Erskine said (p. 524) :—"Although the repeal by the statute 53 Geo. III. c. 160, of the incapacities and penalties imposed by the earlier statutes has not made any difference as to the truth or error of their tenets, and cannot, in my opinion, reflect back any light upon Lady Hewley's intentions in 1704, it has removed the only obstacle that could have intercepted her bounty if they had been originally objects of it. It is indeed still blasphemy punishable at common law scoffingly or irreverently to ridicule or impugn the doctrines of the Christian faith, and no one would be allowed to give or claim any pecuniary encouragement for such a purpose ; yet any man may, without subjecting himself to any penal consequences, soberly and reverently examine and question the truth of those doctrines which have been assumed as essential to it. And I am not aware of any impediment to the application of any charitable fund for the encouragement of such inquiries." Mr. Justice Coleridge said (p. 539), that (in order to arrive at the same conclusion) it was "not necessary to break in upon any of those *dicta* by which Christianity has been declared parcel of the common law, nor to extend the operation of the different Toleration Acts beyond the literal meaning of their language. But Unitarians profess to be Christians as much, and we doubt not as sincerely, as Trinitarians ; and I apprehend that there is nothing unlawful at common law in reverently denying doctrines parcel of Christianity, however fundamental. It would be difficult to draw a line in such matters according to perfect orthodoxy, [*462] or to define how far one might depart from it in believing or teaching without offending the law. The only safe and, as it seems to me, practical rule, is that which I have pointed at, and which depends on the sobriety and reverence and seriousness with which the teaching or believing, however erroneous, are maintained." Baron Parke (at p. 565) agreed "that the preaching of doctrines called Unitarian is not on that account illegal at common law, and all the statutory penalties have been repealed." Chief Justice Tindal said (at p. 578) :—"I consider that since the statute 53 Geo. III. c. 160, all distinction between Unitarians and other Protestant Dissenters as to this purpose is by law taken away."

These opinions are, of course, of the highest authority, and have

been treated as settling the law in all subsequent cases in which they have been cited. Thus in 1846 in *Shrewsbury* v. *Hornby* (5 Hare's Reports, 406), a bequest to the treasurer of the Unitarian Association to assist Unitarian congregations and maintain a Unitarian missionary was upheld. In *Re Barnett* (29 L. J. Ch. 871), a legacy to the minister of Cross Street Chapel, Manchester, to be applied "towards the support of the Unitarians," was also upheld. In Scotland, Lord Jeffrey, in an eloquent judgment, gave a similar decision. (*General Assembly of Baptist Churches* v. *Taylor*, 3 Dunlop & Bell, 2nd Series, Cases in the Court of Session, p. 1030.) It was in accordance with these judgments that it was held in February, 1874, in a Scotch Court that the Rev. Page Hopps's Life of Jesus, a Unitarian book written in a reverent spirit, could not be pirated with impunity by an orthodox missionary, who sought to justify his piracy by the plea that it was a blasphemous publication and therefore incapable of copyright. (See Copinger on Copyright, 2nd edition, p. 91.) It cannot therefore be maintained that Unitarianism is, or ever was, blasphemous at common law, and it follows that the *dicta* in *Woolston's case* are unreliable, and cannot be regarded in the present day as good law without considerable qualification. And see the recital in the Dissenters' Chapels Act, 7 & 8 Vict. c. 45.

Again, trusts and legacies to promote the spread of the Jewish religion clearly "strike at the very root of Christianity;" yet they are always enforced in our law courts. Formerly, no doubt, it was different. In 1754 Lord Hardwicke, in the case of *Da Costa* v. *De Pas* (Ambler, 228; 2 Swanston, 487, n.), decided on the express authority of *R.* v. *Taylor* and *R.* v. *Woolston*, that a bequest of 1,200*l.* to found a "Jesuba or assembly for reading the law and instructing people in our holy religion," was void, as being in "contradiction to the Christian religion, which is part of the law of the land." But [*463] this is not law now. By the statute 9 & 10 Vict. c. 59, Jews are now placed on the same footing as Protestant Dissenters, and all bequests to promote the propagation of Judaism are now valid. And, indeed, trusts and legacies in favour of Jewish synagogues were valid before this statute, a distinction being taken between an act of worship and the inculcation of anti-Christian doctrine. (Per Abbott, J., in *Lazarus* v. *Simmonds* (1818), 3 Mer. 393, n.)

There is only one recent equity case in which either the letter or the spirit of *Woolston's case* has been followed, and that is *Briggs* v. *Hartley* (1850), 19 L. J. Ch. 416. There a testator left a legacy for the "best essay on the subject of natural theology, treating it as a science, and demonstrating the truth, harmony and infallibility of the evidence on which it is founded, and the perfect accordance of such evidence with reason; also demonstrating the adequacy and sufficiency of natural theology when so treated and taught as a science to constitute a true, perfect, and philosophical system of universal religion (analogous to other universal systems of science, such as astronomy, &c.), founded on immutable facts and the works of creation, and beautifully addressed to man's reason and nature,

and tending, as other sciences do, but in a higher degree, to improve and elevate his nature, and to render him a wise, happy, and exalted being." And this was the judgment of Vice-Chancellor Shadwell:—"I cannot conceive that the bequest in the testator's will is at all consistent with Christianity, and therefore it must fail." The editors of Jarman on Wills, 4th edition, p. 210, say "this case would probably not be followed; no cases were cited in the argument at all." This decision stands alone. In *Thornton* v. *Howe* (1862), 31 Beav. 14, a trust for "printing, publishing, and propagating the sacred writings of the late Joanna Southcote" was held good by Romilly, M. R., and in *Pare* v. *Clegg* (1861), 29 Beav. 589, the learned judge held that there was nothing illegal or immoral in a society whose chief object was to propagate the visionary doctrines of the late Robert Owen.

It must, of course, be admitted that the law laid down by Lord Coleridge in *R.* v. *Ramsey and Foote* cannot be reconciled with every one of the earlier decisions. It is not to my mind inconsistent with *R.* v. *Taylor*, but it is certainly opposed to the *dicta*, if not to the decision, in *R.* v. *Woolston*. Was then Lord Coleridge bound by these *dicta?* I think not. It is in no way the duty of a judge to accept all the *dicta* of his predecessors without regard to the circumstances in which they were uttered and apply them literally in a different age and in other circumstances. Still less is this the duty [*464] of a judge when those *dicta* are avowedly based on considerations of public policy which are now admitted to be erroneous. Again, it must be admitted that Lord Coleridge's view of the law is entirely opposed to both the *dicta* and the decision in the civil case, *Cowan* v. *Milbourn*, *ante*, p. 455. And since the summing-up was delivered his view has not been universally accepted by the Bench. Huddleston, B., was certainly disposed to dissent from it in *Pankhurst* v. *Thompson*, 3 Times L. R. 199; but the case was settled, so that it was unnecessary to deliver any judgment. And see *Pankhurst* v. *Hamilton*, 3 Times L. R. 500. And Mr. Justice Stephen, in his "History of the Criminal Law of England" (vol. ii. p. 474), undoubtedly inclines to the view that "the true legal doctrine upon the subject is that blasphemy consists in the character of the matter published, and not in the manner in which it is stated;" though he admits that "there is no doubt some authority in favour of a different view of the law." But in a former work, "The Digest of Criminal Law" (p. 97), Mr. Justice Stephen placed his present definition of the law and that given by Lord Coleridge in parallel columns as equally good law, adding in a note, "There is authority for each of these views; most of the cases are old, and I do not think that, in fact, any one has been convicted of blasphemy in modern times for a mere decent expression of disbelief in Christianity."

Those who wish to pursue this inquiry further are referred to an article by Mr. Justice Stephen in the "Fortnightly Review" for March, 1884, and to a pamphlet by Mr. Aspland, Q.C. (Stevens and Haynes, 1884), in which the views expressed in that article are candidly examined. In conclusion I may say that I have stated the

law laid down in *Shore* v. *Wilson* and *R.* v. *Ramsey and Foote* at the beginning of this chapter as the existing law of blasphemy, not only because it appears to me to be "the better opinion" in point of law, but also because it is, I am sure, the only law on the subject that it is possible to enforce in the present day, the only law which is at all consonant with our modern ideas of universal toleration and religious equality.

In aid of the common law, many statutes have at different times been passed to punish particular species of blasphemy. Of these the following appear to be still unrepealed :—

"Whatsoever person or persons shall deprave, despise, [*465] or contemn the most blessed Sacrament in contempt thereof by any contemptuous words or by any words of depraving, despising, or reviling, or what person or persons shall advisedly in any other wise contemn, despise, or revile the said most blessed Sacrament, shall suffer imprisonment of his or their bodies and make fine and ransom at the king's will and pleasure." (1 Edw. VI. c. 1, s. 1.)

"Any vicar or other minister whatsoever that shall preach, declare, or speak anything in the derogation or depraving of the Book of Common Prayer, or anything therein contained, or of any part thereof," shall on conviction for the first offence suffer forfeiture of one year's profit of benefices and six months' imprisonment, and for the second offence, one year's imprisonment and deprivation, and for the third offence, deprivation and imprisonment for life : or, if not beneficed, for the first offence imprisonment for one year, and for the second offence imprisonment for life. 2 & 3 Edw. VI. c. 1., s. 2 ; 1 Eliz. c. 2, s. 2.)

Any person whatsoever, lay or clerical, who "shall in any interludes, plays, songs, rhymes, or by other open words, declare or speak anything in the derogation, depraving, or despising of the same book, or of anything therein contained, or any part thereof," shall for the first offence forfeit one hundred marks, for the second offence four hundred marks, and for the third offence shall forfeit all his goods and chattels to the Queen and be imprisoned for life. (2 & 3 Edw. VI. c. 1, s. 3 ; and 1 Eliz. c. 2, s. 3.)

These provisions are applied to our present Book of Common Prayer by the 14 Car. II. c. 4, s. 1.

Every person ecclesiastical, who shall persist in maintaining or affirming any doctrine directly contrary or repugnant to any of the Articles agreed on in the Convocation holden at London in 1562, shall be deprived of his living. (13 Eliz. c. 12, s. 2.)

[*466] The statute 3 Jac. I. c. 21, as to players, was repealed in 1843 by the 6 & 7 Vict. c. 68, s. 1.

"If any person, having been educated in, or at any time having made profession of, the Christian religion within this realm, shall by writing, printing, teaching, or advised speaking, assert or maintain that there are more Gods than one, or shall deny the Christian religion to be true, or the Holy Scriptures of the Old and New Testament to be of divine authority," he shall, on conviction by the oath of two or more credible witnesses, be deprived of all offices,

civil, ecclesiastical, and military, unless he renounce his errors within four months from the date of his conviction; and for a second offence he shall be declared unable to sue in any court of law or equity, to be a guardian, an executor or administrator, to take any legacy, or to hold any office, and shall also suffer imprisonment for three years. But information must be given on oath to a magistrate within four days after such words were spoken, and the prosecution must be within three months after such information. (9 Will. III. c. 35 [c. 32 in the Statutes at Large], as amended by 53 Geo. III. c. 160.)

But this statute does not affect or alter the common law (*R.* v. *Carlile*, 3 B. & Ald. 161; *R.* v. *Williams*, 26 Howell's St. Tr. 656); nor would its repeal. (*R.* v. *Waddington*, 1 B. & C. 26; *Att.-Gen.* v. *Pearson*, 3 Mer. at pp. 399, 405, 407.)

This Act appears to be directed rather against *apostasy* than blasphemy. So far as I am aware, there has never been a single prosecution under it, partly, perhaps, from the difficulty there would be in proving that the person accused had been educated in, or made profession of, the Christian religion; partly, perhaps, because the punishment for a first offence is so slight. "Advised speaking" probably means words spoken deliberately, as opposed to "a casual expression dropped inadvertently." (See *Buder* v. *Heath*, 15 Moore, P. C. C. 80; Brodrick & Fremantle, at p. 234.)

By the Burial Laws Amendment Act, 1880 (43 & 44 [*467] Vict. c. 41, s. 7, any person who shall at any burial under the Act, "under colour of any religious service or otherwise, in any churchyard or graveyard, wilfully endeavour to bring into contempt or obloquy the Christian religion, or the belief or worship of any church or denomination of Christians, or the members or any minister of any such church or denomination, or any other person, shall be guilty of a misdemeanor."

Such, then, is the existing law as to blasphemy. It is not, I think, so harsh and illiberal as some have imagined. If Lord Coleridge and the judges in *Shore* v. *Wilson* are right, it does not place any barrier in the way of the freest inquiry or of the largest intellectual or spiritual progress. It permits the frankest avowal and the warmest advocacy of all opinions, however heretical, which the writer or speaker sincerely entertains. It only interferes where our religious feelings are insulted and outraged by wanton and unnecessary profanity.

I venture however to add some observations on the question, much discussed of late, whether the existing law should be amended, and, if so, in what direction and to what extent.

In the first place, every one will agree that the present difference of opinion among our judges as to what precisely is the law on the point should at once be set at rest. Probably most will also agree that all the statutes just recited (except the Burial Acts Amendment Act) should be repealed forthwith. These objects will be attained

when the excellent Bill brought in by Mr. Courtney Kenny becomes law. The text will be found in Appendix C., *post*, p. 705. It will be observed that the concluding proviso is moulded on Article 298 of the Indian Penal Code, which runs as follows :—

"Whoever, with the deliberate intention of wounding the religious feelings of any person, utters any words, or makes any sound in the hearing of that person, or makes any gesture in the sight of that person, or places any object in the sight of that person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine or with both."

But there is another Bill, which, though sadly neglected, is still, I suppose, in some form or other before Parliament. I refer to the Criminal Code Bill, the 141st section of which is as follows :—

"Every one shall be guilty of an indictable offence, and shall be liable upon conviction thereof to one year's imprisonment, who publishes any blasphemous libel.

[* 468] It shall be a question of fact whether any particular published matter is or is not a blasphemous libel : Provided that no one shall be liable to be convicted upon any indictment for a blasphemous libel only for expressing in good faith and in decent language, or attempting to establish by arguments used in good faith and conveyed in decent language, any opinion whatever upon any religious subject."

The framers of the Code apparently intend to abolish the crime of *oral* blasphemy, as the section is confined to published libels, thus exempting all spoken lectures and addresses, however offensive, from the scope of the criminal law. I doubt if there is any sufficient reason for this change. The subsequent proviso should of course be extended to protect all words used in serious discussion, and intended to make known and to recommend opinions which the speaker conscientiously entertains. But if a lecturer deliberately chooses to shock his audience by using profane language when it is not necessary for purposes of serious discussion, or for the advocacy of opinions which he conscientiously entertains, then I do not see that he deserves protection. However, the proposed alteration is but a slight one, as only one man, so far as I am aware, had been convicted of oral blasphemy since 1676, and that was George Jacob Holyoake in 1842.

It has been also objected to this clause in the Criminal Code Bill, that it gives no definition of a "blasphemous libel." It will be observed, however, that an express proviso has been added to set at rest for ever the doubt felt by Mr. Justice Stephen, and I think that this proviso, explaining what is *not* blasphemy, is to some extent a definition. As to the word "libel," it is practically impossible to define it, and it is undesirable therefore to make the attempt. A jury generally has no difficulty in deciding whether a given publication is or is not a libel ; but the malice of mankind takes such various forms that any definition, however carefully worded (unless it were confined to vague but safe generalities), would be apt to exclude some cases which deserve punishment, while it included others which should have passed uncondemned.

This brings us to a further objection. The Criminal Code Bill will, it is said, "virtually leave the whole question to the jury," whereas it is better that "such outrages and insults to religious feelings as really merit punishment should be dealt with summarily by a magistrate, that procedure being preferable to the preliminaries and prolonged publicity of a jury trial, which at best serves to advertise rather than suppress what is truly obnoxious." But this objection will not, I think, commend itself to those best acquainted with our county and borough magistrates. It is contrary to all the [*469] traditions of our law. Over and over again it has been laid down that "libel or no libel is pre-eminently a question for a jury." "The jury," says Mr. Justice (now Lord) Fitzgerald, in *R.* v. *Sullivan*, 11 Cox, C. C. 50, "are true guardians of the liberty of the press." No doubt it may sometimes be a work of nicety to draw the line between liberty and licence, to distinguish the honest advocacy of heterodox opinions from malicious and wanton profanity. But, as the Lord Chief Justice remarks, the difference is one, not of degree but of kind. In every action for defamation where "privilege" is pleaded, or a question of "*bonâ fide* comment" arises, the jury has a precisely similar duty to perform, and, as a rule, performs that duty admirably. There can be no doubt but that questions such as these are best left to the common sense of an ordinary British jury. Proceedings before justices, moreover, attain in the present day as much publicity as trials by jury; I should be sorry if it were otherwise.

But there are some who are satisfied neither with the proposals contained in the English Criminal Code Bill, nor with the provisions of Mr. Courtney Kenny's Bill for the abolition of prosecutions against laymen for the expression of opinion on matters of religion. They make a *third* suggestion, and that is to abolish the law relating to blasphemy altogether. They maintain that prosecutions for blasphemy do more harm than good; that they create a false sympathy with the offenders, and bring Christianity itself into hatred and contempt; that it is impossible to protect the religious feelings of all classes from insult and outrage: and that the true Christian would punish those who thus offended with contempt and scorn; but not by criminal proceedings, which only serve to advertise and bring into prominence the books condemned.

I feel there is much force in this argument. But at the same time I mistrust all propositions to abolish anything entirely. It is so easy. It saves all the trouble of sifting out what is good from what is bad. There is generally something worth preserving in all our English institutions, though it may be thickly overlaid with an accumulation of antiquated abuses. Is there nothing good, then, in our law as to blasphemy? Is it a good or an evil thing that men should be restrained from exhibiting in the public streets and in shop windows blasphemous pictures of the life of Christ, and other offensive caricatures such as appeared in the illustrated Christmas number of the Freethinker for 1882? Why is it more unchristian to prosecute those who engraved and published these pictures, than to prosecute a man for perjury or for an assault? Such a caricature is no argu-

[*470] ment; it is simply a gratuitous insult to the religious feelings of the immense majority of us. It did no one any good. It certainly did harm to thousands of young people, who gazed at it when exhibited in shop-windows in the public streets, whilst it must have pained and wounded ten thousand more. Yet if the whole of our law against blasphemy were abolished, there would be nothing to prevent or prohibit such an exhibition.

Our religious emotions surely demand from the law as much protection as our moral sense. It appears to me that there must and ought to be some law in force which will restrain the unnecessary exhibition of gross and offensive caricatures of holy things, and will prohibit outrages upon our best and highest feelings. What good can such publications do? Do they in any way advance the cause of truth? Is any one the wiser, or the better, or the happier, for having seen or read them? I trust I yield to no one in my desire for the freest and fullest religious liberty. I would abolish every obstacle to the honest search after truth. Let light be thrown on every question; let all matters, however sacred, be canvassed in the unfettered freedom of genuine and earnest discussion; let every man hold and teach whatever religious opinions he may conscientiously adopt. But the amplest measure of religious liberty is wholly compatible with, nay, it conduces to promote, a spirit of profound reverence for sacred things. Whatever tends to weaken or diminish this spirit is an injury to the community. And I hold, therefore, that it is the duty of our legislators, while, on the one hand, they protect and encourage all serious and reverent controversy on religious matters, yet, on the other hand, to make adequate provision for the prevention of blasphemous libels which give wanton and unnecessary offence to the highest and noblest instincts of our nature.

CHAPTER XVII. [*471]

OBSCENE WORDS.

It is a misdemeanour punishable by indictment and by information to publish obscene and immoral books and pictures ; for such an act is destructive of the public morality and welfare, though it may not reflect on any particular person, and as such it is punishable at common law (*R* v. *Curl*, 2 Strange, 788 ; 1 Barnard. 29, *ante*, p. 454).

The test of obscenity is this :—" Whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall." (Per Cockburn, C. J., in *R.* v. *Hicklin*, L. R. 3 Q. B. 371 ; 37 L. J. M. C. 89 ; 16 W. R. 801 ; 18 L. T. 395 ; 11 Cox, C. C. 19.)

Similarly it is a crime to speak vicious and immoral words, provided they be uttered before a large assembly, so as to affect the mass of society ; for else there is no detriment to the general public.

Obscene words and libels are apparently within the jurisdiction of Courts of Quarter Sessions ; not being excepted by the 5 & 6 Vict. c. 38.

The punishment may be either fine or imprisonment for a term of any length, and either with or without hard labour. (14 & 15 Vict. c. 100, s. 29.)

Illustrations.

Wilkes was fined £500 and imprisoned for a year for printing and publishing " An Essay on Woman."

R v. *John Wilkes*, 4 Burr. 2527 ; 2 Wils. 151 ; Dig. L. L. 69.

[*472] Actors have been prosecuted for performing obscene plays.

Tremayne's Entries, 209, 213, 214, 215 ; Str. 790.

The obscene words must be set out in the indictment *verbatim*.

Bradlaugh & Besant v. *The Queen* (C. A.) 3 Q. B. D. 607 ; 48 L. J. (M. C.) 5 ; 26 W. R. 410 ; 38 L. T. 118 ; 14 Cox, C. C. 68.

An information was granted against the printer of a newspaper called " The Daily Advertiser, Oracle and True Briton," for publishing an advertisement by a young married woman offering to become anybody's mistress on certain pecuniary terms.

R. v. *Stuart*, 3 Chit. Crim. L. 887.

Where an officer of the Society for the Suppression of Vice purposely went to the prisoner's shop and asked to see some indecent prints, and was shown several by the prisoner in a back room, of which he bought two in order to found a prosecution thereon, this was held a sufficient publication to sustain the charge.

R. v. *Carlile*, 1 Cox, C. C. 229.

" Obtaining and procuring "obscene works for the purpose of uttering and selling them is a misdemeanour indictable at common law ;

for it is an overt act taken in pursuance of an unlawful intention : but merely "preserving and keeping them in one's possession" for the same purpose is not indictable ; for "there is no act shown to be done which can be considered as the first step in the prosecution of a misdemeanour." (Per Lord Campbell, C. J., in *Dugdale* v. *Reg.*, Dears. C. C. 64 ; 1 E. & B. 425 ; 22 L. J. M. C. 50 ; 17 Jur. 546 ; and per Park, J., in *R.* v. *Rosenstein*, 2 C. & P. 414.)

By the 20 & 21 Vict. c. 83, if any one reasonably believes that any obscene books, or pictures, are kept in any place for the purpose of being sold or exhibited for gain, he may make a complaint on oath before the police magistrate, stipendiary magistrate, or any two justices, having jurisdiction over such place. The magistrate or justices must be satisfied :—

(i.) That such belief is well founded : and for that purpose the complainant must also state on oath that at least one such book or picture has in fact been sold or exhibited for gain in such place.

(ii.) That such book or picture is so obscene that its publication would be a misdemeanour.

[*473] (iii.) That such publication would be a misdemeanour proper to be prosecuted as such.

Thereupon the magistrate or justice issues a special warrant authorizing their officer to search for and seize all such books and pictures, and bring them into Court ; and then a summons is issued calling upon the occupier of the place to appear and show cause why such books and pictures should not be destroyed. Either the owner, or any other person claiming to be the owner, of such books and pictures may appear : but if no one appears, or if in spite of appearance the justices are still satisfied that the books and pictures, or any of them, are of such a character that their publication would be a misdemeanour proper to be prosecuted, they must order them to be destroyed ; if not so satisfied, they must order them to be restored to the occupier of the place in which they were seized. The order for the destruction of such books must state, not only that the magistrate is satisfied that the books are obscene, but also that he is satisfied that the publication of them would be a misdemeanour, and proper to be prosecuted as such : else such order will be bad on the face of it, as not showing that the magistrate had jurisdiction to make it, and a *certiorari* will be granted, in spite of the 2 & 3 Vict. c. 71, s. 49, to bring it up and quash it. (*Ex Parte Bradlaugh*, 3 Q. B. D. 509 ; 47 L. J. M. C. 105 ; 26 W. R. 758 ; 38 L. T. 680.)

Any person aggrieved by the determination of the justices may appeal to Quarter Sessions by giving notice in writing of such appeal, and of the grounds thereof, and entering into a recognizance within seven days after such determination. Hence the books and pictures ordered to be destroyed will only be impounded during such seven days ; on the eighth day, if no notice of appeal be given, they will be destroyed. If the appeal be dismissed, or not prosecuted, the Court of Quarter Sessions may order the books and pictures to destroyed. (See the Act *in extenso* in Appendix D., *post*, p. 722.) The death of the [*474] complainant after the issuing

of the summons will not cause the proceedings to lapse. (*R.* v. *Truelove*, 5 Q. B. D. 336 ; 49 L. J. M. C. 57 ; 28 W. R. 413 ; 42 L. T. 250 ; 14 Cox, C. C. 480.)

If the work be in itself obscene, its publication is an indictable misdemeanour, and the work may be seized under this Act, however innocent may be the motive of the publisher. (*R.* v. *Hicklin*, L. R. 3 Q. B. 371 ; 37 L. J. M. C. 89 ; 16 W. R. 801 ; 18 L. T. 398 ; 11 Cox, C. C. 19.)

If any point of law arises under this Act, the magistrates or justices may state a case for the opinion of a Superior Court, under the 20 & 21 Vict. c. 43, irrespective of the power of appeal given by sect. 4. That the libel is an accurate report of a judicial proceeding is no defence, if it contain matter of an obscene and demoralizing character. (*Steele* v. *Brannan*, L. R. 7 C. P. 261 ; 41 L. J. M. C. 85 ; 20 W. R. 607 ; 26 L. T. 509.)

Any one who openly exposes or exhibits any indecent exhibition or obscene prints or pictures in any street, road, public place or highway, or in any window or other part of any house situate in any street, road, public place or highway, shall be deemed a rogue and vagabond, and punished on summary conviction. (5 Geo. IV. c. 83, s. 4, as explained by the 1 & 2 Vict. c. 38, s. 2. See *post*, pp. 713, 714.) The 3 Geo. IV. c. 40, s. 3, is repealed.

By the 33 & 34 Vict. c. 79, s. 20, the postmaster-general may prevent the delivery by post of any obscene or indecent prints, photographs, or books.

Illustrations.

The Protestant Electoral Union published a book, called "The Confessional Unmasked," intended to expose the abuses of the Roman Catholic discipline, and to promote the spread of the Protestant religion. But however praiseworthy such a motive may be thought, many passages in the book were necessarily obscene, and it was seized and condemned as an obscene libel.

R. v. *Hicklin*, L. R. 3 Q. B. 360 ; 37 L. J. M. C. 89 ; 16 W. R. 801 ; 18 L. T. 395 ; 11 Cox, C. C. 19.

[*475] The Protestant Electoral Union thereupon issued an expurgated edition of "The Confessional Unmasked," with some new matter. For selling this George Mackey was tried at the Winchester Quarter Sessions on October 19th, 1870, when the jury, being unable to agree as to the obscenity of the book, were discharged without giving any verdict. The Union thereupon published "A Report of the Trial of George Mackey," in which they set out the full text of the second edition of "The Confessional Unmasked ;" although it had not been read in open Court, but only taken as read, and certain passages in it referred to. A police magistrate thereupon ordered all copies of this "Report of the Trial of George Mackey" to be seized and destroyed as obscene books. *Held*, that this decision was correct.

Steele v. *Brannan*, L. R. 7 C. P. 261 ; 47 L. J. M. C. 85 ; 20 W. R. 607 ; 26 L. T. 509.

[*476] CHAPTER XVIII.

SEDITIOUS WORDS.

Seditious words may be defined generally in the words 60 Geo. III. & 1 Geo. IV. c. 8, s. 1, as any words which tend "to bring into hatred or contempt the person of his Majesty, his heirs or successors, or the Regent, or the government and constitution of the United Kingdom as by law established, or either House of Parliament, or to excite his Majesty's subjects to attempt the alteration of any matter in Church or State as by law established, otherwise than by lawful means."

Seditious words may in some special cases amount to Treason or to Treason-felony. This chapter will, therefore, be divided into

I.—*Treasonable Words.*

(i.) Words merely spoken.
(ii.) Words written or printed but not published.
(iii.) Words written or printed and published.

II.—*Seditious Words.*

(i.) Words defamatory of the Sovereign himself.
(ii.) Words defamatory of the King's Ministers and Government.
(iii.) Words defamatory of the Constitution and of our Laws generally.
[*477] (iv.) Words defamatory of either House of Parliament, or of the members thereof.
(v.) Words defamatory of Courts of Justice, and of the Judges thereof.
(a) Superior Courts.
(b) Inferior Courts.

I.—Treason and Treason-Felony.

(i.) Words *merely spoken* against the king or his ministers cannot amount to treason. It was resolved in *Hugh Pine's Case*, Cro. Car. 117 (overruling several arbitrary decisions of earlier date), "that, unless it were by some particular statute, no words will be treason." *

* The story so frequently repeated that in the reign of Edward IV., Thomas Burdett was convicted of high treason for saying that he wished the horns of his stag in the belly of him who had advised the king to shoot it (though it is still to be found in Blackstone, vol. iv. c. 6), has been proved by Hallam to be mythical. The charge against Burdett was of a much more serious nature; and these idle words of his are not anywhere alluded to in the indictment against him. ("Middle Ages," c. viii. *ad fin.*)

There is no such statute ; but by sect. 3 of the 11 & 12 Vict. c. 12, to express, utter, and declare, *by open and advised speaking*, certain traitorous compassings, imaginations, inventions, devices, or intentions, is made treason-felony. (See the section in Appendix. The words in italics were not in the earlier statutes to the same effect ; see *ante*, p. 466, as to their meaning.)

But words *accompanying any act* may be given in evidence to explain the intention with which the act is done.

(ii) Words written or printed, but *not published*, cannot be treason at common law ; and they do not constitute an overt act of treason within the meaning of the 25 Edw. III. c. 2. The decisions to the contrary in *R.* v. *Peacham* (1615), Cro. Car. 125, 2 Cobbett's St. Tr. 870, and *R.* v. *Algernon Sidney*, (1683), 9 St. Tr. 889, 893, were reversed by a private Act of Parliament in 1619. (See Hallam's [*478] Const. Hist. I. 467.) But by the 6 Anne, c. 7 (al. 41), s. 1 (passed in 1707, probably in consequence of a libel called "Mercurius Politicus ;" see *R.* v. *Brown*, Holt, 425 ; 11 Mod. 86 ; *post*, p. 487), "maliciously, advisedly and directly, by writing or printing, to maintain and affirm," that Queen Anne was not the rightful Queen, that the Pretender or any one else, except the descendants of the Electress Sophia, had any right or title to the Crown, or that Act of Parliament could not bind the Crown, and limit the descent thereof, was made high treason ; and it does not appear that any publication is requisite to complete the offence created by this statute.

(iii.) But a writing which imports a compassing the king's death within the meaning of 25 Edw. III. c. 2, will amount to an overt act of treason, if it be *published*.

Illustration.

Williams, a barrister of the Middle Temple, wrote two books, "Balaam's Ass" and the "Speculum Regale," in which he predicted that King James I. would die in the year 1621. He was indicted for high treason, convicted, and executed.

R. v. *Williams*, 2 Rolle R. 88.

By the 36 Geo. III. c. 7, made perpetual by the 57 Geo. III. c. 6 (as amended by 11 & 12 Vict. c. 12, s. 1), to compass, devise, or intend death or wounding, imprisonment, or bodily harm to the person of the Sovereign, and such compassing, device or intention to express, utter, or declare, *by publishing any printing or writing*, or by any overt act or deed, is made high treason, punishable with death.

And by the 11 & 12 Vict. c. 12, s. 3, to compass, devise, and intend to depose the Queen, or to levy war against her by force or constraint to compel her to change her counsels, or to intimidate either House of Parliament, or to stir up any foreigner or stranger with force to invade any of her dominions ; and such compassings, devices, or intentions, or any of them, to express, [*479] utter, or declare, *by publishing any printing or writing, or by open and advised speaking*, or by any overt act or deed, is made treason-fel-

ony, punishable with transportation (now penal servitude) for life. (See the section in Appendix.)

II.—Sedition.

It is a misdemeanour, punishable by indictment or by information, to libel or to slander the Sovereign, or his administration, or the Constitution of the realm, or either House of Parliament, or its members, or any judge or magistrate. It is also a high misprision or contempt; and therefore the defendant may be fined to any amount, or sentenced to a term of imprisonment of any length, or both, at the discretion of the judge, as in *praemunire*. Formerly, banishment and the pillory could also be inflicted; but these punishments are now abolished. (60 Geo. III. & 1 Geo. IV. c. 8, ss. 1, 2, 3, 4; 11 Geo. IV. & 1 Will. IV. c. 73, s. 1; 7 Will. IV. and 1 Vict. c. 23). In cases not calling for severer punishment, the offender may be required to find sureties for his good behaviour. (*Ex parte Seymour* v. *Michael Davitt*, 12 L. R. Ir. 46; 15 Cox, C. C. 242.

The offence can not be tried at Quarter Sessions.

(i.) *Words defamatory of the Sovereign himself.*

It is sedition to speak or publish of the King any words which would be libellous and actionable *per se*, if printed and published of any other public character.

Thus, any words will be deemed seditious, which strike at the King's private life and conduct, which impute to him any corrupt or partial views or assign bad motives for his policy, which insinuate that he is a tyrant, and does not take a lively interest in the welfare of his subjects, or which charge him with deliberately favouring or oppressing any individual or class of men in distinction to the rest of [*480] his subjects. (*R.* v. *Dr. Shebbeare*, 1758, 3 T. R. 430, *note*). *A fortiori*, any words are seditious which strike at his title to the Crown, call his legitimacy in question, or are otherwise treasonable (*R.* v. *Clerk*, 1729, 1 Barnardiston, 304; *R.* v. *Knell*, 1 Barnard. 305; *R.* v. *Nutt. ib.* 306.)

But to assert that the King is misled by his ministers, or that he takes an erroneous view of some great question of policy is not seditious, if it be done respectfully, with decency and moderation.

Illustrations.

The following words appeared in the *Morning Chronicle* for October 2nd, 1809:—"What a crowd of blessings rush upon one's mind that might be bestowed upon the country in the event of a total change of system! Of all monarchs, indeed, since the Revolution, the successor of George the Third will have the finest opportunity of becoming nobly popular." On the trial of a criminal information against the proprietor and printer of the paper for libel Lord Ellenborough told the jury that if they considered that the words meant that the king's death would be a blessing to the nation, and that the sooner it happened the better, then they should find the prisoners guilty; but that if they thought the passage could fairly be construed as an expression of regret that

an erroneous view had been taken of public affairs, and of a wish for some change in the policy and system of administration under His Majesty, they might acquit them. The jury found the prisoners, Not Guilty.

R. v. *Lambert & Perry*, 2 Camp. 398 ; 3 How. St. Tr. 340.

To publish falsely of the King that he is insane is a criminal libel, as it would be of any other person.

R. v. *Harvey & Chapman*, 2 B. & C. 257.

So is charging the King with a breach of his coronation oath.

Oliver St. John's Case (1615), Noy, 105.

To insinuate that the King is a liar and a deceiver, and to assert that he has treacherously betrayed the interests of his subjects and allies, and prostituted the honour of his crown, (*The North Briton*, No. 45), is a seditious libel.

R. v. *John Wilkes* (1763), 4 Burr. 2527 ; 19 How. St. Tr. 1075.

R. v. *Kearsley* } Dig. L. L. 69.
R. v. *John Williams* }

As to certain of the letters of Junius, see

R. v. *Woodfall*, 5 Burr. 2661.

R. v. *Almon*, *ib.* 2686.

Many *dicta* in the old text-books represent the law as stricter on this point than is stated above. According to Hawkins' "Pleas of [* 481] the Crown," i. c. 6 (8th ed. by Curwood, p. 66), and 4 Blackstone, 123, c. ix. ii. 3, it is a high misprision and contempt merely to speak contemptuously of the King, to curse him or wish him ill, to assert that he lacks wisdom, valour or steadiness, or, in short, to say anything "which my lessen him in the esteem of his subjects, weaken his government, or raise jealousies between him and his people." But I can find no decision reported which supports so wide a proposition : and I venture to doubt if in the present day it would be deemed a crime to call the King a coward or a fool. Mere words of vulgar abuse can hardly amount to sedition. In fact, the only distinction that the law makes between words defamatory of the King, and of any other leading public character appear to be :—

(i) That the former may be criminal when only *spoken ;* whereas the latter must be written or printed and published ;

(ii) That in the case of the former it can not be pleaded as a defence that the words are true. (*R.* v. *Francklin*, (1731), 9 St. Tr. 255 ; 17 Howell's St. Tr. 626 ; *Ex parte O'Brien*, 12 L. R. Ir. 29 ; 15 Cox, C. C. 180.)

(ii.) *Words defamatory of the King's Ministers and Government.*

It is sedition to speak or publish of individual members of the Government words which would be libellous and actionable *per se*, if written and published of any other public character.

It is also sedition to speak or publish words defamatory of the Government collectively, or of their general administration, with intent to subvert the law, to produce public disorder, or to foment or promote rebellion.

"There is no sedition in censuring the servants of the Crown, or in just criticism on the administration of the law, or in seeking redress of grievances, or in the fair [* 482] discussion of all party

questions." (*Per* Fitzgerald, J., in *R.* v. *Sullivan*, 11 Cox, C. C. 50.)

Where corrupt or malignant motives are attributed to an individual minister, the words are clearly seditious.

Where, however, no particular person is libelled, the jury must be satisfied that the author or publisher maliciously and designedly intended to subvert our laws and constitution, and to excite dissatisfaction and disorder. There must be a criminal intent. But such an intent will, of course, be presumed, if the natural and necessary consequence of the words employed be "to excite a contempt of Her Majesty's Government, to bring the administration of its laws into disrepute, and thus impair their operation, to create disaffection, or to disturb the public peace and tranquillity of the realm." (*R.* v. *Collins* (1839), 9 C. & P. 456 ; *R.* v. *Lovett*, *ib.* 462.)

In determining whether such is a natural and necessary consequence of the words employed, the jury should consider the state of the country and of the public mind at the date of the publication : passages which in tranquil times might be comparatively innocent might be most pernicious in a time of insurrection. (*Per* Fitzgerald, J., 11 Cox, C. C. 50, 59.) On the other hand, the circumstances which provoked the attack may tell in the prisoner's favour. If a man be smarting under a grievance, or honestly indignant at some act of a government official, he can not be expected to speak or write as calmly and deliberately as if he were discussing matters in which he felt no special interest. (*Per* Littledale, J., in *R.* v. *Collins*, 9 Car. & P. 460.) The jury should, in every case, consider the book or newspaper article *as a whole*, and in a fair, free, and liberal spirit : not dwelling too much upon isolated passages, or upon a strong word here or there, which may be qualified by the context, but endeavouring to gather the general effect which the whole composition would have on the minds of the public. Considerable latitude must be given to political writers. [* 483] (*Per* Lord Kenyon, C. J., in *R.* v. *Reeves*, Peake, Add. Ca. 84 ; 26 How. St. Tr. 530.)

Illustrations.

To attribute "the sad state of the country to the influence of French gold on those who have the conduct of affairs," is a seditious libel, though no particular minister is singled out ; but to complain of "the mismanagement of the navy through the ignorance and incapacity of those who have the management of it," would (it is submitted) not be held a libel in the present day.

R. v. *Tutchin* (1704), 5 St. Tr. 527 ; 14 Howell's St. Tr. 1095 ; Holt, 424 ; 2 Lord Raym. 1061 ; 1 Salk. 50 ; 6 Mod. 268.

An announcement that a collection had been made for "the relief of the widows, orphans, and aged parents of our beloved American fellow-subjects, who, faithful to the character of Englishmen, preferring death to slavery, were for that reason only inhumanly murdered by the king's troops at or near Lexington and Concord in the province of Massachusetts on the 19th of April last," was held a seditious libel on his Majesty's Government and their employment of his troops, tending to foment discord and to promote rebellion.

R. v. *John Horne* (afterwards *John Horne Tooke*) (1777), 11 St. Tr. 264 ; 20 Howell's St. Tr. 651 ; Cowp. 672.

Articles in the *Examiner* declaring that an improper and cruel method of punishment was practised in the King's army, and that his soldiers were punished with excessive severity thereby, was declared by the jury in spite of the sum-

ming up of Lord Ellenborough, *not* to be a seditious libel on the Government and the military service of the King tending to excite disaffection in the army and to deter others from becoming recruits.

R. v. *John Hunt & John Leigh Hunt* (1811), 31 Howell's St. Tr. 408; 2 Camp. 583.
See also *R.* v. *Pym, vel Prin* (1664), Sid. 219; 1 Keble, 773.
R. v. *Beere* (1698), 12 Mod. 219; Holt, 422; Carth. 409; 2 Salk. 417; 1 Ld. Raym. 414.
R. v. *Laurence* (1699), 12 Mod. 311; Dig. L. L. 121.
R. v. *Bedford* (1714), cited in 2 Str. 789; Dig. L. L. 19, 121.
R. v. *Bliss* (1719), Dig. L. L. 122.
R. v. *Francklin* (1731), 9 St. Tr. 255; 17 Howell's St. Tr. 626.
R. v. *Owen* (1752), 18 Howell's St. Tr. 1203; Dig. L. L. 67.
R. v. *Cobbett* (1804), 29 Howell's St. Tr. 1.
R. v. *Johnson* (1805), 29 Howell's St. Tr. 103; 7 East, 65; 3 Smith, 94.
R. v. *Burdett* (1820), 4 B. & Ald. 95, 115, 314.
R. v. *Collins* (1839), 9 C. & P. 456.
R. v. *Lovett* (1839), 9 C. & P. 462.
R. v. *John Mitchell* (1848), 11 L. T. (O. S.) 112; 3 Cox, C. C. 94.
Re Crowe (1848), 3 Cox, C. C 123.
R. v. *Fussell* (1848), 3 Cox, C. C. 291.

[*484] By the Statutes of *Scandalum magnatum*, 3 Edw. I. c. 34; 2 Rich. II. c. 5; 12 Rich. II. c. 11; *ante*, c. IV. pp. 134—136, it is a crime to tell or publish false news or tales of the great officers of the realm, &c.

So also in America, by Act of Congress, July 14, 1798, it is an indictable offence to libel the Government, Congress or President of the United States.

There are old cases which appear to go further, and to decide that any publication tending to beget an ill opinion of the Government is a criminal libel. "If persons should not be called to account for possessing the people with an ill opinion of the Government, no Government can subsist; for it is very necessary for all Governments that the people should have a good opinion of it" (*sic*). (*Per* Lord Holt, C. J., in *R.* v. *Tutchin* (1704), 5 St. Tr. 532; 14 Howell's St. Tr. 1127.) And Lord Ellenborough, C. J., expressly following this decision, told the jury in *R.* v. *Cobbett* (1804), 29 Howell's St. Tr. 49:—"It is no new doctrine that if a publication be calculated to alienate the affections of the people, by bringing the Government into discsteem, whether the expedient be by ridicule or obloquy, ... it is a crime." If this is to be taken literally, all Opposition newspapers commit such crime every day. Such a doctrine, if strictly enforced, would destroy all liberty of the press, and is, moreover, in conflict with more recent *dicta*:—"The people have a right to discuss any grievances that they may have to complain of." (*Per* Littledale, J., in *R.* v. *Collins*, 9 Car. & P. 461.) "A journalist may canvass and censure the acts of the Government and their public policy—and indeed, it is his duty. It might be the province of the press to call attention to the weakness or imbecility of a Government when it was done for the public good." (*Per* Fitzgerald, J., 11 Cox, C. C. 54, 57.) It is clearly legitimate and constitutional to endeavour, by means of arguments addressed to the people, to

replace one set of ministers by another. And the precise object of such arguments is to bring the ministers now in office into disesteem, and to alienate from them the affections of the people. Sir Francis Burdett could not possibly be convicted in the present day for such an electoral address as he issued on August 22nd, 1819. (See 4 B. & Ald. 116, 7 n.)

But I think Lord Holt's words must not be taken strictly in their modern signification : we must construe them with reference to the [*485] times in which he spoke. He clearly was not referring to a quiet change of ministry which in no way shakes the throne, or loosens the reins of order and government. In 1704 the present system of party-government was not in vogue : it was barely conceived by William III., and was certainly not generally understood under Queen Anne. And even in Lord Ellenborough's time the ministry were still appointed by the King and not by the people. By "the Government" both judges meant, not so much a particular set of ministers, as the political system settled by the Constitution, the general order and discipline of the realm. "To subvert the Government" is the phrase employed in the earlier case of *R.* v. *Beere*, 12 Mod. 221 ; Holt, 422 ; and to Lord Holt's mind "subverting the Government" meant bringing in the Pretender ; to Lord Ellenborough's the introduction of Jacobinism and Red Republicanism from France : not the substitution of one statesman for another as First Lord of the Treasury.

(iii.) *Words defamatory of the Constitution and of our laws generally.*

All malicious endeavours by word, deed or writing, to promote public disorder or to induce riot, rebellion or civil war, are clearly seditious, and may be overt acts of treason. But where no such conscious endeavour is proved, still, if the natural and necessary consequence of any words, deed, or writing, be to subvert our laws and constitution and to excite or promote discontent and disorder amongst the people, a criminal intent will be presumed : and the author is guilty of sedition. (*R.* v. *Burdett* (1820), 4 B. & Ald. 95 ; *R.* v. *Collins* (1839), 9 C. & P. 456.) Thus all publications, the direct tendency of which is to bring the constitution of the realm into hatred and contempt, and to induce the people to disobey the laws and to defy legally [*486] constituted authority, are seditious libels, for which the author is criminally liable.

But mere theoretical discussions of abstract questions of political science, comparisons of various forms and systems of government, and controversies as to details of our own constitutional law, are clearly permissible. And so is any *bonâ fide* effort for the repeal by constitutional methods of any law deemed obnoxious. The prosecution must satisfy the jury that the publication is calculated to disturb the tranquillity of the State and to lead ignorant persons to endeavour to subvert the Government and to break the laws of the realm. Without satisfactory proof of such tendency, there

is no evidence of that criminal intention which is essential to constitute the offence.

The old cases *R.* v. *Brewster* (1663), Dig. L. L. 76 ; *R.* v. *Harrison* (1677), 3 Keb. 841 ; Ventr. 324, and *R.* v. *Bedford* (1714), cited in 2 Str. 789, so far as they run counter to this proposition, must be considered as overruled. It seems that Harrison would not have been convicted but for the stat. 13 Car. II. c. 1, which, to my surprise, remains still in part unrepealed. See *post*, pp. 488, 691.

The jury must find, first, that the defendant in fact spoke or published the words complained of : secondly, that the words are seditions and were spoken and published with the intent alleged in the indictment. The latter as well as the former is entirely a question for the jury. The fact that the House of Commons has resolved that the same publication is " a malicious, scandalous and seditious libel, tending to create jealousies and divisions amongst the liege subjects of Her Majesty, and to alienate the affections of the people of this country from the Constitution," ought not to weigh with the jury in the least. The defendant is not to " be crushed by the name of his prosecutor." (*Per* Lord Kenyon, C. J., in *R.* v. *Reeves*, Peake, Add. Ca. 84.)

[*487] " In a free country like ours," says Lord Kenyon, C. J., in the same case, p. 86, " the productions of a political author should not be too hardly dealt with." The jury should " recollect that they are dealing with a class of articles which, if written in a fair spirit and *bonâ fide*, might be productive of great public good, and were often necessary for public protection ;" and they should therefore " deal with them in a broad spirit, allowing a fair and wide margin, looking upon the whole, not on isolated words." And they should also take into their consideration the state of the country and of the public mind at the date of publication. (*Per* Fitzgerald, J., *R.* v. *Sullivan*, 11 Cox, C. C. 50, 59.)

Illustrations.

To assert that a parliament would be justified in making war against any king who broke the Social Compact, was naturally deemed seditious in the days of Charles II., as tending to a renewal of the Civil War.

R. v. *Brewster* (1663), Dig. L. L. 76.

R. v *Harrison* (1677), 3 Keble, 841 ; Ventr. 324 ; Dig. L. L. 66.

To assert that " the late revolution was the destruction of the laws of England," or an unjustifiable and unconstitutional proceeding, and that the Act of Settlement was " illegal and unwarrantable," and " had been attended with fatal and pernicious consequences to the subjects of this realm," was deemed seditious in the days of Queen Anne and of George II., as tending to favor the cause of the Pretender.

R. v. *Dr. Brown* (1707), 11 Mod. 86 ; Holt, 425.

R. v. *Richard Nutt* (1754), Dig. L. L. 68.

And see *R.* v. *Thomas Paine* (1792), 22 Howell's St. Tr. 358.

The Reverend William Winterbotham was convicted for preaching a sermon on November 18th, 1792, containing the following words, which were deemed seditious :—" Darkness has long cast her veil over the land. Persecution and

tyranny have carried universal sway. Magisterial powers have long been a scourge to the liberties and rights of the people." He was fined £100 and sentenced to two years' imprisonment.

R. v. *Winterbotham*, 22 Howell's St. Tr. 823, 875.

R. v. *Richard Carlile*, 4 C. & P. 415.

To habitually republish in Ireland during a time of political excitement and threatened insurrection extracts from American papers expressing sympathy with the Fenians, and inciting all Irishmen to rebel, without one word of editorial comment or disapproval, is an act of sedition.

R. v. *Pigott* (1868), 11 Cox, C. C. 47.

See Irish St. Tr. 1848, 1865, 1867, 1868.

[*488] It is a misdemeanour for a Roman Catholic priest to address a meeting of his parishioners and urge them not to pay any rent till a certain evicted tenant is reinstated in his holding; such advice coming from a person in his position being an incitement to the parishioners to conspire not to pay their just debts.

R. v. *JJ. of Queen's County*, 10 L. R. Ir. 294; 15 Cox, C. C. 149.

R. v. *JJ. of Cork*, 10 L. R. Ir. 1; 15 Cox, C. C. 78.

Ex parte Seymour v. *Michael Davitt*, 12 L. R. Ir. 46; 15 Cox, C. C. 242.

By an entirely obsolete, but still unrepealed, section, any person who shall maliciously and advisedly declare and publish by writing, printing, preaching or other speaking, that the Parliament begun at Westminster on November 3rd, 1640 (the Long Parliament) is not yet dissolved, or that it ought still to be in being, or hath yet any continuance or existence, or that both Houses of Parliament or either House of Parliament have or hath a legislative power without the King, or any other words to the same effect, incurs the penalties of a *præmunire*. 13 Car. II. stat. I. c. 1, s. 3. See also 6 Anne, 7 (al. 41), s. 2.

(iv.) *Words defamatory of either House of Parliament, or of the Members thereof.*

It is a misdemeanour to speak or publish of individual members of either House of Parliament, in their capacity as such, words which would be libellous and actionable *per se*, if written and published of any other public character.

It is also a misdemeanour to speak or publish words defamatory of either House collectively, with intent to obstruct or invalidate their proceedings, to violate their rights and privileges, to diminish their authority and dignity, or to bring them into public odium or contempt.

In both cases, all such words are also a contempt and breach of privilege, punishable summarily by the House itself, with fine and imprisonment.

Also by the Statutes of *Scandalum magnatum*, 3 Edw. I. c. 34; 2 Rich. II. c. 5; 12 Rich. II. c. 11; *ante*, c. IV. pp. 134, 135, it is a crime to "devise, tell or publish any false news, lyes, or such other false things," of any member of the House of Lords, or of any great officer of the realm.

[* 489] *Illustrations.*

Rainer printed a scandalous libel, reflecting both on the House of Lords and on the House of Commons, called "Robin's Game, or Seven's the Main;" he

was tried in the Court of King's Bench, fined £50, and sentenced to be imprisoned for two years and until he should pay such fine.
R. v. *Rainer*, 2 Barnard. 293; Dig. L. L. 125.

On three occasions the House of Commons has voted a particular publication a scandalous and seditious libel, and a breach of privilege, &c., and petitioned the Crown to direct the Attorney-General to prosecute the author, printers and publishers thereof. But, strange to say, on each occasion such prosecution has been unsuccessful; the jury in each of the three cases having acquitted the prisoner. (*R.* v. *Owen* (1752), 18 Howell's St. Tr. 1203, 1228; *R.* v. *Stockdale* (1789), 22 Howell's St. Tr. 238; *R.* v. *Reeves* (1796), Peake, Add. Ca. 84; 26 Howell's St. Tr. 530.) Hence the House of Commons now invariably deals with offenders itself.

The House of Lords can inflict fine and imprisonment for any length of time. In former days the pillory was sometimes added; *e. g.*, in the case of Thomas Morley in 1623, and of William Carr in 1667, who were sentenced to stand in the pillory for libelling individual peers.

The House of Commons can inflict fine and imprisonment, and, in the case of a member, expulsion. One unfortunate member, Arthur Hall, suffered all three penalities in 1581 for publishing a book disparaging the authority of the House of Commons, and reflecting upon certain individual members—see Hallam, Const. Hist. Vol. I. c. v.—the first instance of a libel being punished by the House. But in the case of a commitment by the House of Commons, the imprisonment can only last till the close of the existing session. The prisoner must be liberated on prorogation (*Stockdale* v. *Hansard*, 9 A. & E. 114; *Grissel's case*, Aug. 1879). It is otherwise with the House of Lords.

The Speaker's warrant is a perfect answer to any writ of *habeas corpus*, and fully justifies the Serjeant-at-arms and his officers in arresting the offender, and protects them from any action of assault [* 490] or false imprisonment (*Howard* v. *Gosset*, 10 Q. B. 359; *Burdett* v. *Colman*, 14 East, 163). It will not be scanned too strictly by the courts of law, nor set aside for any defect of form (*R.* v. *Paty*, 2 Ld. Raym. 1108; *R.* v. *Hobhouse* (1819), 2 Chit. 210). Thus, the libel for which the prisoner was committed need not be set out in such warrant (*Burdett* v. *Abbot*, 14 East, 1; see 1 Moore, P. C. C. 80); though the libel must always be set out at full length in either an indictment (*Bradlaugh and Besant* v. *The Queen*, (C. A.) 3 Q. B. D. 607; 48 L. J. M. C. 5; 26 W. R. 410; 38 L. T. 118), or a statement of claim (*Harris* v. *Warre*, 4 C. P. D. 125; 48 L. J. C. P. 310; 27 W. R. 461; 40 L. T. 429). Still less will any court of common law inquire into the propriety of the commitment or hear it argued that the act complained of did not amount to a contempt, or that the privilege of the House alleged to have been broken does not exist (*Stockdale* v. *Hansard*, 9 A. & E. 165, 195). The Queen's Bench Division cannot bail a prisoner

committed for a contempt of the House of Commons (*Hon. Alex. Murray's Case*, 1 Wilson, 299).

The House is the best judge of its own privileges, and of what is a contempt of them. But if on the face of the warrant it *plainly and expressly* appears that the House is exceeding its jurisdiction, it will be the duty of the High Court to order the release of the prisoner. (9 A. & E. 169; Hawkins, 3 Pl. Cr. II. 15, 73, p. 219; *R.* v. *Evans and another*, 8 Dowl. 451.)

The House may commit for any contempt of one of its committees, or of the members of any such committee; instances of such committals occurred in 1832, 1858, and 1879.

So in America the House of Representatives has a general power of committing for contempt, whether the offender be a member or a stranger (*Anderson* v. *Dunn*, 6 Wheat. 204). But, as with the English House of Commons, the imprisonment terminates at the adjournment or dissolution of Congress.

But with subordinate legislative bodies it is different. No power of committing for contempt is inherent in them (*Kielley* v. *Carson*, 4 Moore, P. C. C. 63; *Fenton* v. *Hampton*, 11 Moore, P. C. C. 347, overruling *dicta* of Lord Denman, C. J., in *Stockdale* v. *Hansard*, 9 A. & E. 114; of Parke, B., in *Beaumont* v. *Barrett*, 1 Moore, P. C. C. 76); although they have, of course, power to preserve order during their deliberations, which involves a power to remove from the [* 491] Chamber any person obstructing their proceedings, or otherwise guilty of disorderly conduct *in the presence of the House itself*, and if the offender be a member, to exclude him for a time, or even to expel him altogether. Such latter power is necessary for self-preservation; and is quite distinct from the judicial power of sentencing the obstructive to a term of imprisonment as a punishment for his misconduct (*Doyle* v. *Falconer*, L. R. 1 P. C. 328; 36 L. J. P. C. 37; 15 W. R. 366; *Attorney-General of New South Wales* v. *Macpherson*, L. R. 3 P. C. 268; 7 Moo. P. C. (N. S.) 49; 39 L. J. P. C. 59; *Barton* v. *Taylor*, 11 App. Cas. 197; 55 L. J. P. C. 1; 55 L. T. 158). Thus the House of Assembly of Newfoundland (*Kielley* v. *Carson*, 4 Moore P. C. C. 63); the Legislative Council of Van Diemen's Land (*Fenton* v. *Hampton*, 11 Moore, P. C. C. 347); the House of Keys in the Isle of Man (*Ex parte Brown*, 5 B. & S. 280; 33 L. J. B. Q. 193; 12 W. R. 821; 10 L. T. 453); and the Legislative Assembly of the Island of Dominica (*Doyle* v. *Falconer*, L. R. 1 P. C. 328; 36 L. J. P. C. 33; 15 W. R. 366), possess no inherent powers to commit for contempt.

But though such a power is not inherent in any inferior legislature, it may be expressly granted by statute; thus the Legislative Assembly of Victoria possesses this privilege by virtue of the 18 & 19 Vict. c. 55, s. 35, and the Colonial Act, 20 Vict. No. 1 (*Dill* v. *Murphy*, 1 Moore, P. C. C. (N. S.) 487; *Speaker of the Legislative Assembly of Victoria* v. *Glass*, L. R. 3 P. C. 560; 40 L. J. P. C. 17; 24 L. T. 317). Also, it is said that such a power may be acquired by prescription, acquiescence and usage. (*Per* Lord Ellenborough, C. J., in *Burdett* v. *Abbot*, 14 East, 137, and Cockburn, C.

J., in *Ex parte Brown*, 5 B. & S. 293.) And it is by virtue of such acquiescence and usage that the Jamaica House of Assembly has the power of committing a libeller, if indeed it has such power at all (*Beaumont* v. *Barrett*, 1 Moore, P. C. C. 80, as explained by Parke, B., in 4 Moore, P. C. C. 89).

[* 492] (v.) *Words defamatory of Courts of Justice and of Individual Judges.*

(*a*) Superior Courts.

It is a misdemeanour to speak or publish of any judge of a Superior Court words which would be libellous and actionable *per se*, if written and published of any other public officer.

It is also a misdemeanour to speak or publish words defamatory of any court of justice or of the administration of the law therein, with intent to obstruct or invalidate its proceedings, to annoy its officers, to diminish its authority and dignity, and to lower it in public esteem.

Such words, whether spoken or written, are punishable on indictment or information, with fine or imprisonment or both. They are also in every such case a contempt of court punishable summarily by the Court itself with fine or commitment.

Such words are also indictable under the Statutes of *Scandalum magnatum* (3 Edw. I. c. 34 ; 2 Rich. II. c. 5 ; 12 Rich. II. c. 11 ; *ante*, c. IV. pp. 134, 135), as well as at common law.

It is immaterial whether the words be uttered in the presence of the Court or at a time when the Court is not sitting, and at a distance from it (*Crawford's Case*, 13 Q. B. 630 ; 18 L. J. Q. B. 225 ; 13 Jur. 955) ; nor need they necessarily refer to the judges in their official capacity.

But "there is no sedition in just criticism on the administration of the law. . . . A writer may freely criticise the proceedings of courts of justice and of individual judges—nay, he is invited to do so, and to do so in a free, and fair, and liberal spirit. But it must be without malignity, and not imputing corrupt or malicious motives." (*Per* Fitzgerald, J., in *R.* v. *Sullivan*, 11 Cox, C. C. 50.) "It certainly is lawful, with decency and candour, to discuss the propriety of the verdict of a jury, or the decisions of a [* 493] judge, ... but if the extracts set out in the information contain no reasoning or discussion, but only declamation and invective, and were written, not with a view to elucidate the truth, but to injure the characters of individuals, and to bring into hatred and contempt the administration of justice in the country," then the defendants have transgressed the law, and ought to be convicted. (*Per* Grose, J., in *R.* v. *White and another*, 1 Camp. 359, n.)

Illustrations.

To say that a judge had been bribed, or that in any particular case he had endeavoured to serve his own interests, or those of his friends or of his party, or wished to curry favour at Court, or was influenced by fear of the Government

or of any great man, or by any other side-motive other than a simple desire to arrive at the truth and to mete out justice impartially, is a seditious libel.

See *R.* v. *Lord George Gordon*, 22 Howell's St. Tr. 177.

To call the Lord Chief Justice "a traitor and a perjured judge," and to allege that a recent judgment delivered by him was treason, is a misdemeanour.

R. v. *Jeffe* (1632), 15 Vin. Abr. 89.

Hutton, J. v. *Harrison*, Hutton, 131.

To say that the Lord Chief Justice disgraces his high station and prevents justice being done, is a misdemeanour.

R. v. *Hart and White* (1808), 30 How. St. Tr. 1168, 1345 ; 10 East, 94.

R. v. *Wrennum* (1619), Popham, 135.

Butt v. *Conant*, 1 Brod. & Bing. 548 ; 4 Moore, 195 ; Gow, 84.

Hurry sued Watson for a malicious prosecution, and recovered damages £3,000 ; the corporation of which Watson was a member thereupon resolved "that Mr. Watson had been actuated by motives of public justice in prosecuting Hurry," and voted him £2,300 towards payment of his damages. The Court of King's Bench granted an information against the members of the corporation.

R. v. *Watson & others*, 2 T. R. 199.

[That the vote of money was an improper employment of the corporate funds is very probable ; but so far as the mere words of the resolution are concerned, I see no misdemeanour. They appear to me to be but a temperately worded statement that the corporation differed from the jury in their opinion of Mr. Watson's conduct.]

Besides such indictable offences, many other acts and words are contempts of court. Thus it is contempt of court to insult the judge, jury or witnesses, to obstruct any officer of the Court in the execution of his duty, to express contempt for the process of the Court, to calumniate the parties concerned in any cause, to prejudice the [*494] minds of the public against the suitors or others before the cause is finally heard, or in any other way to taint the source of justice or to divert or interrupt its ordinary course. (See the judgment of Blackburn, J., in *Skipworth's Case*, L. R. 9 Q. B. 232, 241.) Lord Hardwicke says, in *Roach* v. *Garvan*, *Re Read & Huggonson*, 2 Atk. 469 ; 2 Dick. 794 :—

"There are three different sorts of contempt.

"One kind of contempt is, scandalizing the Court itself.

"There may be likewise a contempt of this Court in abusing parties who are concerned in causes here.

"There may be also a contempt of this Court, in prejudicing mankind against persons, before the cause is heard.

"There cannot be anything of greater consequence, than to keep the streams of justice clear and pure, that parties may proceed with safety both to themselves and their characters."

In all such cases a Superior Court may interfere summarily to protect itself, and fine the offender or commit him to prison *proprio motu* ; and this, although no indictable offence has been committed. (*Per* Lord Holt, C. J., in *R.* v. *Rogers*, 7 Mod. 29.) Any further or threatened publication may be restrained by injunction. (See *ante*, p. 337.) An application either for such an injunction or to commit for contempt must be made promptly, and it will be refused if the applicant has himself invited or commenced public discussion of the matter in the public press. (*Daw* v. *Eley*, L. R. 7 Eq. 49 ; 38 L. J. Ch. 113 ; 17 W. R. 245.)

Illustrations.

Even the prisoner in the dock, who is always allowed great latitude, if he be defending himself, may be fined for contempt of court, if he persist in using blasphemous language and in applying offensive epithets to the presiding judge in the course of his speech to the jury. The learned judge remitted the fines at the beginning of his summing-up to the jury.

R. v. *Davison*, 4 B. & Ald. 329.

[*495] So, too, a barrister may be guilty of contempt of court, if he unnecessarily insults one of the jury in the course of his address to them.

In re Pater, 5 B. & S. 299; 33 L. J. M. C. 142; 12 W. R. 823; 10 L. T. 376.

The most innocent words, if uttered in a peculiar manner and tone, may be a contempt of court. For an insult may be conveyed either by language or by manner.

Carus Wilson's Case, 7 Q. B. 984, 1015.

If a high sheriff proceeds to address the grand jury in open Court at the close of the judge's charge, and persists in so doing, though ordered by the judge to sit down and be quiet, he may be fined £500 for contempt.

In re The High Sheriff of Surrey, 2 F. & F. 234, 237.

To beat and kick the officer of the Court who serves a *subpœna*, and to compel him to eat the wax and parchment thereof, is a contempt, punishable by committal.

Williams v. *Johns* (1773), cited in the note to *Elliot* v. *Halmarack*, 1 Mer. 303.

So is merely using abusive and violent language towards any person serving the process of any Court.

Price v. *Hutchison*, L. R. 9 Eq. 534; 18 W. R. 204.

R. v. *Jones* (1719), 1 Stra. 185.

It is a contempt of court and a libel, punishable by attachment, to publish a pamphlet asserting that judges have no power to issue an attachment for libels upon themselves, and denying that reflections upon individual judges are contempts of court at all.

R. v. *Almon*, Wilmot's Notes of Opinions and Judgments, p. 253.

Any attempt to bribe a judge, or to influence his probable decision on a matter before him by any private communication, is a contempt of court.

Martin's Case, 2 Russ. & Mylne, 674, n.

Macgill's Case, 2 Fow. Ex. Pr. 404.

But not every silly or impudent letter addressed to a judge about a matter which he *has* decided will be treated as a contempt.

R. v. *Faulkner*, 2 Mont. & Ayr. 321, 322; 2 C. M. & R. 525; 1 Gale, 210.

Nor every inaccurate report of judicial proceedings which either party may think fit to publish.

Matthews v. *Smith*, 3 Hare, 331.

Brook v. *Evans*, 29 L. J. Ch. 616; 6 Jur. N. S. 1025; 8 W. R. 688.

Buenos Ayres Gas Co. v. *Wilde*, 29 W. R. 43; 42 L. T. 657.

To preach a sermon with special reference to a pending trial is a contempt of court.

Mackett v. *Herne Bay Commissioners*, 24 W. R. 845; *ante*, p. 338.

As to exhibiting models of the person murdered and the alleged murderer in the assize town during the assizes, see

R. v. *Gilham*, 1 Moo. & Mal. 165.

It is a contempt for a party to a suit to publish before the case has come on for hearing a copy of his brief, or even an abstract of his petition or statement of claim, or of the affidavits filed on either side, or any other *ex parte* statement [*496] tending to prepossess the minds of the public in his favour, or to calumniate his adversary.

Captain Perry's Case, cited 2 Atk. 469; 2 Dick. 794.

Mrs. Farley's Case, Cann v. *Cann*, 2 Vesey, senr. 520; 3 Hare, 333, n.

Coleman v. *West Hartlepool Harbour and Railway Co.*, 8 W. R. 734; 2 L. T. 766.

A petition for winding up a company, containing charges of fraud against the directors, was published *in extenso* in a newspaper before the hearing of the petition. This was held a contempt of court, and the publishers of the paper were ordered to pay the costs of a motion to commit them.

In re The Cheltenham & Swansea Waggon Co., L. R. 8 Eq. 580; 38 L. J. Ch. 330; 17 W. R. 463; 20 L. T. 169.

Tichborne v. *Mostyn*, L. R. 7 Eq. 55, n.; 15 W. R. 1072; 17 L. T. 5.

And see *Kitcat* v. *Sharp*, 52 L. J. Ch. 134; 31 W. R. 227; 48 L. T. 64; W. N. (1882), 183.

Bowden v. *Russell*, 46 L. J. Ch. 414; 36 L. T. 177; Weekly Notes (1877), 55.

Any article in a newspaper commenting on a case still before the Court is a contempt, if it in any way tends to pervert the course of justice, though written temperately and respectfully, and in all other respects such an article as might properly and legitimately be written and published *after* the trial is ended.

R. v. *Clement*, 4 B. & Ald. 218; 11 Price, 69.

Littler v. *Thompson*, 2 Beav. 129.

Roach v. *Garvan, Re Read & Huggonson*, 2 Atk. 469; 2 Dick. 794.

Tichborne v. *Mostyn per* Wood, V.-C., L. R. 7 Eq. 57, n.; 15 W. R. 1074; 17 L. T. 7.

Tichborne v. *Tichborne*, 39 L. J. Ch. 398; 18 W. R. 621; 22 L. T. 55.

Vernon v. *Vernon*, 40 L. J. Ch. 118; 19 W. R. 404; 23 L. T. 697.

Buenos Ayres Gas Co. v. *Wilde*, 29 W. R. 43; 42 L. T. 657.

Robertson v. *Labouchere*, 42 J. P. 710.

The publication in a newspaper of a correct report of proceedings before a police magistrate which terminated in the committal of the prisoners is not a contempt of court, though it may tend to prejudice the mind of the public against the prisoners. But the publication in a newspaper of comments on such proceedings, and on the conduct of the prisoners, is a contempt of court, if it tends in any way to prejudice the public mind against them before the trial.

R. v. *Gray* (1865), 10 Cox, C. C. 184.

R. v. *O'Dogherty* (1848), 5 Cox, C. C. 348.

An injunction having been granted to restrain the defendants from infringing a patent for nickel-plating, they gave notice of appeal, and published in a newspaper an advertisement inviting the trade to subscribe towards the expenses of the appeal, and also an advertisement offering a reward of £100 to anyone who could produce documentary evidence that nickel-plating was done before 1869. It was held that neither advertisement was a contempt of court.

Plating Co. v. *Farquharson*, (C. A.) 17 Ch. D. 49; 50 L. J. Ch. 406; 29 W. R. 510; 44 L. T. 389; 45 J. P. 568; overruling *Pool* v. *Sacheverel*, 1 P. Wms. 675.

But where a co-respondent in a suit for divorce, immediately after the service [*497] of the citation, caused advertisements to be published denying the charges made in the petition, and offering a reward for information which would lead to the discovery and conviction of the authors of them, it was held that these advertisements constituted a contempt of court.

Brodribb v. *Brodribb & Wall*, 11 P. D. 66; 55 L. J. P. D. & A. 47; 34 W. R. 580; 50 J. P. 407.

So it is a contempt for the solicitor to a defendant to publish in a newspaper anonymous letters full of arguments in the defendant's favour, and denying the facts on which the plaintiff would rely at the trial.

Daw v. *Eley*, L. R. 7 Eq. 49; 38 L. J. Ch. 113; 17 W. R. 245.

The publisher of a newspaper was committed for printing an article which attacked the persons who had made affidavits in a suit in Chancery not yet concluded, imputing to them ignorance of facts and interested motives.

Felkin v. *Herbert*, 33 L. J. Ch. 294; 12 W. R. 241, 332; 9 L. T. 635; 10 Jur. N. S. 62.

See also *Littler* v. *Thompson*, 2 Beav. 129.

In re William Watson, Shaw's Case (Scotch), No. 6.

Still more it is a contempt of court for one committed for trial for perjury, or for any of his partisans, to address public meetings, alleging that there is a conspiracy against him, and that he will not have a fair trial.

Castro, Onslow & Whalley's Case. L. R. 9 Q. B. 219; 12 Cox, C. C., 358.

Skipworth's Case, L. R. 9 Q. B. 430; 12 Cox, C. C. 371.

Threats and insults addressed either to a party or a witness pending a suit, whether by word or letter, are a contempt of court.

Smith v. *Lakeman,* 26 L. J. Ch. 305; 2 Jur. N. S. 1202; 28 L. T. (Old S.) 98.

Shaw v. *Shaw,* 31 L. J. Pr. & Matr. 35; 6 L. T. 477; 2 Sw. & Tr. 515.

Re v. *Mulock,* 33 L. J. Pr. & Matr. 205; 10 Jur. N. S. 1188; 13 W. 278.

So are insulting words addressed to counsel engaged in the cause.

Lessee Sturgeon v. *Douglass,* 10 Ir. L. R. 128, n.

A fortiori, if addressed to the judge or a master.

Lechmere Charlton's Case, 2 Myl. & Cr. 316.

It is a contempt of court for the brother of a prisoner just convicted to call on the foreman of the jury, accuse him of having bullied the jury into finding his brother guilty and challenge him to mortal combat.

R. v. *James Martin,* 5 Cox, C. C. 356.

So the solicitor for the defeated party will be guilty of a contempt, if, even when the case is over, he publishes a pamphlet describing the judgment pronounced as "an elaborate production, wholly beside the merits of the case," with other flippant and contumacious observations.

Ex parte Turner, 3 Mont. D. & De G. 523, 551, 558.

The committee of a lunatic published a pamphlet, written by his wife, reflecting upon persons who were managing the lunatic's estate under the orders of the Court of Chancery, with an address, by way of dedication, to the Lord Chan- [*498] cellor, "flattering the judge to taint the source of justice." Lord Erskine, L. C., committed him to prison for contempt, and the printer as well.

Ex parte Jones, 13 Ves. 237.

Where the Court of Bankruptcy has appointed a receiver to take and hold possession of a bankrupt's property it is a contempt of court for the holder of even a valid bill of sale to forcibly oust the receiver.

Ex parte Cochrane, In re Mead, L. R. 20 Eq. 282; 44 L. J Bkcy. 87; 23 W. R. 726; 32 L. T. 508.

And see *In re Fells, Ex parte Andrews,* 4 Ch. D. 509; 46 L. J. Bkcy. 23; 25 W. R. 382; 36 L. T. 38.

And *Ex parte Drake, In re Ware,* 5 Ch. D. 866; 46 L. J. Ch. 105; 25 W. R. 641; 36 L. T. 677.

In an action for dissolution of a partnership, the defendant was appointed receiver and manager to carry on the business pending the appeal. The plaintiff's son, H. W. Helmore, had formerly been a clerk in the employment of the firm, but had now set up a rival business of his own. While such clerk, he had been furnished with a list of the customers of the firm, which he had taken away with him. He now sent out to each of the customers on that list a circular containing a report of the dissolution proceedings and of the appointment of the defendant as receiver, which was accurate in the main, but conveyed the impression that the business was being wound up, whereas the defendant had been appointed manager expressly in order that he might keep the business together as a going concern till the suit was ended. The circular then stated that while H. W. Helmore was in the employment of the firm the customers' orders had come under his personal supervision, and concluded by soliciting their custom for his own business. The Court of Appeal (affirming Kay, J.) held that the circular was misleading and unfair and a libel on the business, and likely to prejudice the receiver in his management of it, and that it was therefore a contempt of court for which H. W. Helmore was liable to be attached

Helmore v. *Smith,* (C. A.) 56 L. J. Ch. 145; 35 W. R. 157; 56 L. T. 72.

Wilful disobedience to any lawful order of a court or a judge is a contempt, especially if on being served with a copy of the order the party expresses in defiant and contemptuous language his inten-

tion to disregard such order. (*Anon.* (1711), 1 Salk. 94; *R.* v. *Clement*, 4 B. & Ald. 218 ; *Mr. Long Wellesley's Case*, 2 Russ. & Mylne, 639 ; *Hudson* v. *Tooth*, 2 P. D. 125 ; 35 L. T. 820; *Martin* v. *Mackonochie*, 3 Q. B. D. 730 ; *Combe* v. *Edwards*, 3 P. D. 103.) But where the defendant *bonâ fide* desires, but is in fact unable, to obey the order of the Court, such disobedience is not wilful, and is not a contempt. (*Clare* v. *Blakesley and others*, 8 Dowl. 835.) Where, however, a person ordered to per [*499] form a particular act, purposely puts it out of his power to obey with a view of evading the order of the Court, such conduct is an aggravation of his original offence in disobeying, and is in itself a contempt of court.

If a plaintiff be guilty of such contempt, he is liable, in addition to fine or imprisonment, to have all proceedings stayed, or even the whole action dismissed, and money paid into Court returned to the defendant. (*Republic of Liberia* v. *Roye*, 1 App. Cas. 139 ; 45 L. J. Ch. 297 ; 24 W. R. 967 ; 34 L. T. 145.) A true copy of the order of the Court must as a rule be served. (*In re Holt*, 11 Ch. D. 168 ; 27 W. R. 485 ; 40 L. T. 207.) If, however, at the time of disobedience the offender has from any reasonable source knowledge that the order has been made, it is immaterial that the order has not yet been duly served. Notice by telegram may be sufficient. (*In re Bryant*, 4 Ch. D. 98 ; 25 W. R. 230 ; 35 L. T. 489 ; *Ex parte Langley*, *Ex parte Smith*, *In re Bishop*, 13 Ch. D. 110 ; 49 L. J. Bkcy. 1 ; 28 W. R. 174 ; 41 L. T. 388.)

Formerly there was a sharp distinction between committal and attachment. Committal was the proper punishment for doing a prohibited act, and attachment for neglecting to do some act ordered to be done. But now for all practical purposes the distinction has been abolished. A writ of attachment still issues to the sheriff, while an order for committal is placed in the hands of the tipstaff of the Court. "A person committed by the Court is unable to be bailed out, whereas under a writ of attachment the sheriff may accept bail." (*Per* Jessel, M. R., in *Buist* v. *Bridge*, 43 L. T. 432 ; 29 W. R. 117.) Under the former practice it was not necessary to serve notice of motion for attachment. But since the Judicature Acts the old practice has been altered. Neither attachment nor committal can now be obtained by a litigant without notice of motion. And if such notice of motion ask for a writ of attachment where committal is the proper remedy, the judge will amend it. (*Callow* v. *Young*, 56 L. T. 147—Chitty, J.)

The officer charged with the execution of a writ of attachment may break open the outer door of the defendant's house in order to arrest him (*Harvey* v. *Harvey*, 26 Ch. D. 644 ; 32 W. R. 76 ; 51 L. T. 508 ; 48 J. P. 468)—an attachment for contempt being a criminal and not civil process. (*In re Freston*, (C. A.) 11 Q. B. D. 545 ; 52 L. J. Q. B. 545 ; 31 W. R. 581, 804 ; 49 L. T. 290 ; *In re Dudley*, (C. A.) 12 Q. B. D. 44 ; 53 L. J. Q. B. 16 ; 32 W. R. 264 ; 49 [*500] L. T. 737 ; *In re Strong*, (C. A.) 32 Ch. D. 342 ; 55 L. J. Ch. 553 ; 34 W. R. 614 ; 55 L. T. 3.)

Illustrations.

A trustee was ordered to pay £94 14*s.* into Court: on the same day he was adjudicated a bankrupt: the Court refused to attach him for disobedience to the order.

Cobham v. *Dalton*, L. R. 10 Ch. App. 655; 44 L. J. Ch. 702; 23 W. R. 865.

See also *Earl of Lewes* v. *Barnett*, 6 Ch. D. 252; 47 L. J. Ch. 144; 26 W. R. 101.

Pashler v. *Vincent*, 8 Ch. D. 825; 27 W. R. 2.

The defendant had illegally removed a quantity of human bones and earth from the parish burial ground of Chew Magna to his own field. The Court of Arches issued a monition to him to replace them. In the meantime, the defendant, on the marriage of his daughter to a Mr. Bromfield, conveyed this field and other land to the trustees of the marriage settlement, and it was argued that the defendant was unable to obey the order of the Court, as he no longer either owned or occupied the field, and it was further pretended that Mr. Bromfield refused to allow his father-in-law to enter on the field and remove the bones. The Court of Arches pronounced the defendant guilty of contumacy and contempt. The bones were replaced within six days.

Adlam v. *Colthurst*, L. R. 2 Adm. & Eccl. 30; 36 L. J. Ec. Ca. 14.

An advocate at Aberdeen snatched a petition from the Clerk of the Court; the sheriff-substitute remonstrated and warned him he was committing a contempt of court; but the advocate put the petition in his pocket and immediately left the Court. The sheriff-substitute thereupon issued a warrant ordering him to deliver up the document on pain of imprisonment. As soon as the sheriff's officers entered the advocate's office, and demanded the petition, the advocate threw it into the fire. The officers thereupon immediately seized and imprisoned him. In an action brought by the advocate for false imprisonment, *held* by the House of Lords, that the arrest was perfectly lawful under the circumstances.

Watt v. *Ligertwood & another*, L. R. 2 Sc. App. 361.

If the contempt is committed in open court and in presence of the judge, he may commit the offender *instanter*, and without any prior notice. (Gascoyne, C. J., thus committed the Prince of Wales in 1406. See L. R. 2 Sc. App. 367, n.) And I presume this power is not taken away by Order XLIV. r. 2. A written warrant is not essential to such a committal, though it is usual. (*Per* Wightman, J., in *Carus Wilson's Case*, 7 Q. B. 1017.)

But when the offender is not present, and the contempt is committed by words spoken or published out of Court, it is usual to grant first a rule *nisi* calling on the offender to show cause why an attachment should not be granted against him; although the Court still may, and [*501] in flagrant cases will, on clear and satisfactory evidence, grant an attachment in the first instance, and issue its warrant, so that the offender shall answer for his contempt in custody. *Anon.* (1711), 1 Salk. 94; *R.* v. *Jones* (1719, 1 Stra. 185.) The rule *nisi* is granted on affidavit of the fact, though the Court may proceed on its own knowledge, without any suggestion. (*In re The High Sheriff of Surrey*, 2 F. & F. 236; *Skipworth's and Castro's Cases*, L. R. 9 Q. B. 230; 12 Cox, C. C. 358.) If the offender fails to appear and show cause, a warrant may issue for his apprehension (*Lechmere Charlton's Case*, 2 Myl. & Cr. 316); or he may be fined in his absence. (*R.* v *Clement*, 4 B. & Ald. 218.)

When the offender was brought before the Court, it was formerly the custom to adjourn the matter for four days, in order that inter-

rogatories might be exhibited against him, which he was compelled to answer on oath. But now it is usual to dispense with all interrogatories ; the offender at once shows what cause he can, and endeavours to purge his contempt with the aid of ordinary affidavits. If the Court is not satified, it may commit him to prison for a time certain, or may impose a fine, or may do both ; and in every case the Court may further order the offender to pay the costs of the proceedings. (*Martin's Case*, 2 Russ. & Myl. 674, *n.*) But the costs are of course in the discretion of the Court, and will not be granted where the proceedings are clearly vexatious, and the party instituting them is himself to blame. (*Vernon* v. *Vernon*, 40 L. J. Ch. 118 ; 19 W. R. 404 ; 23 L. T. 697.) The costs should be asked for when the rule is argued (*Abud* v. *Riches*, 2 Ch. D. 528 ; 45 L. J. Ch. 649 ; 24 W. R. 637 ; 34 L. T. 713) ; and in cases where the contempt is slight or unintentional, and the offender submits himself to the Court, and has done all in his power to clear his contempt, the Court often makes no other order except that he pay the costs of the motion. (See L. R. 7 Eq. 58, n.)

The commitment must be for a time certain. (*R.* v. *James*, 5 B. & Ald. 894 ; *Green* v. *Elgie and another*, 5 Q. B. 99.) But in all other respects the warrant may be in general terms : no special grounds need be stated ; nor need the facts which are the cause of the arrest be specified : it is sufficient to state the offender is committed for contempt of court. (*Howard* v. *Gosset*, 10 Q. B. 411 ; *Ex parte Fernandez*, 6. H. &. N. 717 ; 10 C. B. N. S. 3.) Two lines are sufficient (*R.* v. *Paty*, 2 Lord Raym. 1108), and will justify the officer of the Court in arresting the offender, and protect him from any action of false imprisonment. It is presumed that the Court was acting regularly and rightly, unless, indeed, the contrary [*502] appears expressly on the face of the writ. (*R.* v. *Evans and another*, 8 Dowl. 451.) And the decision of the judge committing cannot be reviewed by any other court. (*Burdett* v. *Abbot*, 14 East, 1 ; *Stockdale* v. *Hansard*, *per* Littledale, J., 9 A. & E. 169 ; *Carus Wilson's Case*, *per* Lord Denman, C. J., 7 Q. B. 1008). If a fine is inflicted it is usual to add a sentence of imprisonment till the fine be paid, in addition to any other term of imprisonment that may have been inflicted. (L. R. 9 Q. B. 228, 229, 240.) Where the period for which the offender is to be detained is expressed in the margin of the writ, or may be gathered from it by necessary inference, the gaoler should discharge the prisoner at the end of that period. (*Moone* v. *Rose*, L. R. 4 Q. B. 486 ; 38 L. J. Q. B. 236.) But if the warrant dees not state the period for which he is apt to be kept in custody, nor refer to the nature of the contempt committed, the gaoler should not release him without an order of the Court. (*Greaves* v. *Keene*, 4 Ex. D. 73 ; 27 W. R. 416 ; 40 L. T. 216 ; *McCombe* v. *Gray*, 4 L. R. (Ir.) 432.) When the period assigned comes to an end, the offender may not be detained in custody merely for the costs of the application to the Court to commit. (*Jackson* v. *Mawby*, 1 Ch. D. 86 ; 45 L. J. Ch. 53 ; 24 W. R. 92; *Hudson* v. *Tooth*, 2 P. D. 125 ; 35 L. T. 820.) *A fortiori* where condemnation in costs is the only punishment inflicted, the Court has no power subsequently to commit to prison

for default in payment. (*Mickeethwaite* v. *Fletcher*, 27 W. R. 793 ; *Weldon* v. *Weldon*, 10 P. D. 72 ; 54 L. J. P. & D. 26, 60 ; 33 W. R. 370, 427 ; 52 L. T. 233 ; 49 J. P. 517.)

The words "Superior Court" include the House of Lords, the Judicial Committee of the Privy Council, the Court of Appeal, the High Court of Justice and any Divisional Court thereof, and any judge of any Division sitting in Court alone (Jud. Act, 1873, s. 39). Also any Commissioner of Oyer and Terminer, Assize, Gaol Delivery, and Nisi Prius. (*Ex parte Fernandez*, 6 H. & N. 717 ; 10 C. B. N. S. 3; 30 L. J. C. P. 321 ; 7 Jur. N. S. 529, 571 ; 9 W. R. 832 ; 4 L. T. 296, 324 ; *In re McAleece*, Ir. R. 7 C. L. 146.) And the Superior Courts of Law and Equity in Dublin, and the Court of Session in Scotland.

But whether a judge sitting at chambers is "a Superior Court," [* 503] and has such power to commit for contempt, may well be doubted. Wilmot, C. J., was clearly of opinion that a judge at chambers had such a power, as appears by the very learned judgment which he intended to deliver in *R.* v. *Almon* (Wilmot's Opin. and Judgments, 253), but it was not delivered in fact, the case having dropped on the resignation of the then Attorney-General, Sir Fletcher Norton. But there is no instance reported of a judge at chambers himself inflicting fine or imprisonment. He invariably reports any insult offered to him at chambers to the full Court, and leaves it to the Court to punish the offender. And in *R.* v. *Faulkner* (2 Mont. & Ayr. 338 ; 2 C. M. & R. 533 ; 1 Gale, 215), Lord Abinger, C. B., states most distinctly that a judge at chambers has *no* power to commit for contempt. Sect. 39 of the Jud. Act, 1873, seems in no way to enlarge the powers of a judge at chambers ; and its concluding sentence certainly implies that a judge at chambers is not "a Court," and in so far confirms Lord Abinger's opinion. In the analogous case of the Court of Review, it has been decided that a single judge has no power to commit for contempt, except when sitting as the Court. (*Ex parte Van Sandau*, 1 Phillips, 445 ; *Van Sandau* v. *Turner*, 6 Q. B. 773 ; compare, also, *In re Ramsay*, L. R. 3 P. C. 427 ; 7 Moo. P. C. C. N. S. 263 ; *Rainy* v. *Justices of Sierra Leone*, 8 Moo. P. C. C. 47 ; *Macartney* v. *Corry*, 7 Ir. R. C. L. 242.) Hence the better opinion appears to be that a judge at chambers cannot safely commit summarily for a contempt of himself ; although, of course, he constantly issues at chambers writs of attachment *after notice* to the party in default under Order XLIV. (See *Salm-Kyrburg* v. *Posnanski*, 13 Q. B. D. 218 ; 53 L. J. Q. B. 428 ; 32 W. R. 752.)

And *à fortiori* no official or special referee (Jud. Act, Order XXXVI. r. 51), and no arbitrator (3 & 4 Will. IV. c. 42, s. 40) can commit for contempt.

The Colonial Courts of Record are also Superior Courts, and possess the power of instantly committing for contempt in all the above cases ; and no appeal lies from such a commitment to the Privy Council. (*Crawford's Case*, 13 Q. B. 613 ; 18 L. J. Q. B.

225 ; 13 Jur. 955 ; *In re McDermott*, L. R. 1 P. C. 260, 2 P. C. 341 ; 38 L. J. P. C. 1 ; 20 L. T. 47 ; *Hughes* v. *Porral and others*, 4 Moore, P. C. C. 41.) But if it appear on the face of the writ that the Court had exceeded its jurisdiction (*In re Ramsay*, L. R. 3 P. C. 427 ; [*504] 7 Moore, P. C. C. N. S. 263 ; *Rainy* v. *The Justices of Sierra Leone*, 8 Moore, P. C. C. 47), or if the offender had no opportunity given him of defending or explaining his conduct (*In re Pollard*, L. R. 2 P. C. 106 ; 5 Moore, P. C. C. N. S. 111), or if the punishment awarded for the contempt was not appropriate to the offence (*Re Wallace*, L. R. 1 P. C. 283 ; 36 L. J. P. C. 9 ; 15 W. R. 533 ; 14 L. T. 286 ; *Re Downie & Arrindell*, 3 Moore, P. C. C. 414), the order of commitment will be set aside, and the fine ordered to be remitted, by the Judicial Committee of the Privy Council on appeal. But if it sufficiently appears that the prisoner was committed for contempt, and that the Court had power to commit for such contempt, the offender cannot be heard to say that such contempt was not in fact committed. "Every Court in such a case has to form its own judgment." (*Per* Lord Denman, C. J., in *Carus Wilson's Case*, 7 Q. B. 1015.)

When a competent Court, acting clearly within its jurisdiction, states certain matters of fact, affidavits are not admissible to contradict such findings. So if the Colonial Court administers a different system of law from ours, affidavits cannot be received in England to show that the Colonial Court was acting contrary to its own law. The English Courts must "give full credit to that Court for knowing and administering their own law." (*Per* Lord Denman, C. J., in *Carus Wilson's Case*, 7 Q. B. 1014.)

(*b*) Inferior Courts.

The judge of an inferior Court is in no better position than any other public character, so far as words written and published are concerned. It is a misdemeanour to write and publish concerning him in the execution of his office any words which would be libellous and actionable *per se* if written and published of any other public officer.

[* 505] It is not indictable to *speak* disrespectful and abusive words of the judge of an Inferior Court behind his back, or even to his face, provided he be out of court.

But it is indictable to *speak* aloud in open court when the judge is present in the discharge of his duty, words reflecting upon him in his official capacity.

Illustrations.

It is indictable—

to give the lie to the steward of a manor holding a court leet,

Earl of Lincoln v. *Fisher*, Cro. Eliz. 581 ; Ow. 113 ; Moore, 470 ;

to put on your hat in the presence of the lord of a court leet and refuse to take it off, saying, "I care not what you can do,"

Bathurst v. *Coxe*, 1 Keb. 451, 465 ; Sir. T. Raym. 68 ;

to rise up in court and say to the justices in session, "Though I cannot have justice here, I will have it elsewhere,"

R. v. *Mayo*, 1 Keb. 508; 1 Sid. 144 (although Twisden J., mercifully endeavoured to construe the words to mean merely, "I propose to appeal from your decision.");

to say *to* a justice of the peace in the execution of his office, "You are a rogue and a liar,"

R. v. *Revel*, 1 Str. 420;

to call the Mayor of Yarmouth in his Court, in the hearing of the suitors, a puppy and a fool,

Ex parte The Mayor of Yarmouth, 1 Cox, C. C. 122.

But it is not indictable—

to call a justice of the peace, "a logger-headed, a slouch-headed, bursen-bellied hound,"

R. v. *Farre*, 1 Keb. 629;

Nor to say that a justice is a fool, or an ass, or a coxcomb, or a blockhead, or a bufflehead. *Per* Holt, C. J., in

R. v. *Wrightson*, 2 Salk. 698; 11 Mod. 166; 2 Roll. Rep. 78; 4 Inst 181;

Nor to say of an alderman of Hull, that "Whenever he comes to put on his gown, Satan enters into him,"

R. v. *Baker*, 1 Mod. 35;

Nor to say of a justice of the peace in his absence that he is a scoundrel and a liar. *Per* Lord Ellenborough, in

R. v. *Weltje*, 2 Camp. 142;

Nor to accuse a justice of partiality or corruption unless the words were uttered at a time when the magistrate was in the actual execution of his office,

Ex parte The Duke of Marlborough, 5 Q. B. 955; 1 Dav. & Mer. 720;

Nor to tell a borough magistrate, out of court but to his face, that he is a liar, and unfit to be a magistrate, and that he will hear the same every time he [*506] came into town; unless, indeed, the words can be construed as tending to provoke a breach of the peace.

Ex Parte Chapman, 4 A. & E. 773.
See also *Anon.* (1650), Style, 251.
Simmons v. *Sweete*, Cro. Eliz. 78.
Buggs' Case, 11 Rep. 93, 95; 1 Roll. Rep. 79, 173, 224.
R. v. *Burford*, 1 Ventris, 16.
R. v. *Leaf*, Andrews, 226.
R. v. *Penny*, 1 Ld. Raymond, 153.
R. v. *Langley*, 2 Ld. Raymond, 1029; 2 Salk. 697; 6 Mod. 125; Holt, 654.
R. v. *Rogers*, 2 Ld. Raymond, 777; 7 Mod. 28.
R. v. *Nun*, 10 Mod. 186.
R. v. *Granfield*, 12 Mod. 98.
R. v. *Pocock*, 2 Str. 1157.
R. v. *Burn*, 7 A. & E. 190.
These cases overrule *R.* v. *Darby*, 3 Mod. 139; Comb. 65; Carth. 14.

Thus the same act which would be indictable if committed with respect to a Superior Court may not be indictable if only an Inferior Court is concerned. And the power of an Inferior Court to deal itself with such contempts is again still further restricted. For, as we have seen, the Superior Courts could commit to prison in many cases where the offence is not indictable; while an Inferior Court cannot commit in every case which is indictable, and certainly in none which is not. (*R.* v. *Revel*, 1 Str. 420.) Nor can the High Court of Justice commit for a libel which is a contempt of an Inferior Court. (*Ex parte Burns, Champion, Hyndman, and Williams*, 2 Times L. R. 352.)

An Inferior Court of record can only commit for contempts committed in open court, *in facie curiæ*. (*R.* v. *Lefroy*, L. R. 8 Q. B. 134; 42 L. J. Q. B. 121 ; 21 W. R. 332 ; 28 L. T. 132.) The judge or coroner must at the moment be actually discharging his duty ; and the words employed or act done must either be pointedly and personally disrespectful to the judge or coroner himself, or else amount to a serious obstruction of the course of justice. Before actually committing, the judge or coroner should always give the offender an opportunity of explaining his [*507] conduct, and showing cause why he should not be committed.

If the judge or coroner does commit, he must—in the absence of any special custom or defined practice to the contrary—issue a warrant in writing, and duly signed ; he may not commit by word of mouth, as a judge of a Superior Court may sometimes do. (*Mayhew* v. *Locke*, 7 Taunt. 63.) Such warrant should state clearly the cause for which the prisoner was committed and all facts necessary to give jurisdiction to commit. Affidavits are inadmissible to contradict any statement *of fact* contained in the warrant (*In re John Rea* (2), 4 L. R. Ir. 345 ; 14 Cox, C. C. 256) ; though they are admissible to show want of jurisdiction. (*R.* v *Bolton*, 12. B. 73.) But where it sufficiently appears that the prisoner was committed for contempt, and the court had power on the facts as stated by them to commit for such contempt, their decision cannot be reviewed by any court. (*Carus Wilson's Case*, 7 Q. B. 984, 1014 ; *Garnett* v. *Ferrand*, 6 B. & Cr. 625 ; *R* v. *Bolton*, 1 Q. B. 73.) They alone can judge of the insult offered to them. Such a warrant will justify any officer of the Inferior Court in arresting the offender, and protect him from any action of assault or false imprisonment. (*Levy* v. *Moylan*, 19 L. J. C. P. 308 ; 1 L. M. & P. 307.)

Illustrations.

If a coroner for any reason (and the sufficiency of such reason is a matter entirely for the coroner in the exercise of his discretion) order a particular person to quit the room where he is about to hold an inquest, and such person wholly refuse to go, and defiantly continues in the room to the hindrance of the inquest, the coroner may lawfully order him to be expelled.

Garnett v. *Ferrand*, 6 B. & C. 611.

The solicitor for a plaintiff in a County Court wrote a letter to the local newspaper, accusing the judge of the County Court of "arbitrary and tyrannical abuse of power," and calling one statement he had made "a monstrosity" and "an untruth." *Held*, that the judge had no power to proceed against the solicitor for contempt of court ; although the matter was still pending.

R. v. *Le Froy, Ex parte Jolliffe*, L. R. 8 Q. B. 134 ; 42 L. J. Q. B. 121 ; 21 W. R. 332 ; 28 L. T. 132.

Charles Carus Wilson, an English attorney, went to reside in Jersey, and there brought an action against Peter Le Sieur in the Royal Court of Jersey, which was composed of a bailiff and two jurats, or lieutenant-bailiffs. On September 23rd, 1844, the Court was about to deliver an interlocutory judgment in the cause against Wilson, when he interposed, and, in an unbecoming manner, protested against the competency of the Court, his own counsel being present and silent. Wilson had previously been repeatedly warned that his conduct was [*508] disrespectful. The Court thereupon, after giving Wilson full opportunity to explain or apologise for his conduct, sentenced him to pay a fine of £10 and apologise to the Court, and in default to be imprisoned till

obedience. This sentence was duly recorded in the judgment book, and read aloud to Wilson and his counsel then and there; but Wilson wholly refused either to pay or to apologise, and was accordingly at once arrested by the viscount of the island, whose duty it was to carry into effect the sentences of the Royal Court, and lodged in Her Majesty's gaol. A writ of *habeas corpus* was obtained, on the ground that there was no written warrant for his arrest or detainer. The return to the writ set out all the facts, and also stated that by the law and practice of the Island of Jersey no written warrant was necessary or usual, but the sentence duly recorded was of itself a sufficient authority, justifying and compelling the viscount to arrest, and the gaoler to detain, the offender. *Held*, by Lord Denman, C. J., Patteson, Williams, and Wightman, JJ., that affidavits could not be received on behalf of Wilson to show that such was *not* the law or practice of Jersey, and that in other respects the Royal Court had acted inconsistently with its own law; that no written warrant was necessary; that the contempt was a matter which the Royal Court had to decide for itself; that its decision, being the decision of a competent Court, could not be reviewed by the Queen's Bench; and Wilson was accordingly, on April 22nd, 1845, remanded to Her Majesty's prison in Jersey.

Carus Wilson's Case, 7 Q. B. 984.

An Inferior Court not of record has no power to fine or commit for contempt. But it has another remedy: the offender may be required to find *sureties for his good behaviour*,

(i) If he use any disrespectful or unmannerly expressions in the face of the court. (1 Lev. 107; 1 Keb. 558.)

(ii) If, out of court, he uses words disparaging the judge or magistrate in relation to his office.

(iii) If, out of court, he obstruct or insult an officer of the court in the execution of his duty. (Hawk. P. C. c. 61, ss. 2, 3.)

(iv) And generally, if he use any words which directly tend to a breach of the peace.

But *not* for contemptuous and uncivil words spoken of the judge in his private capacity.

Such binding over should be done as soon as possible after the contempt is committed; and in the case of petty sessions, it should de done, *not* by the justice specially attacked, but by one of his brethren. [*509] (*R.* v. *Lee*, 12 Mod. 514.) The person accused may call evidence to disprove the matters charged against him (which he could not do in a case of "articles to keep the peace") but he may not give evidence himself, this being a criminal proceeding. (*Reg. Justices of Queen's County*, 10 L. R. Ir. 294; 15 Cox, C. C. 149.) And in default of sureties being provided, the justices may commit either to the common gaol or to the House of Correction (6 Geo. I. c. 19, s. 2); but it should appear clearly upon the face of their warrant that the committal is for want of sureties, and not merely for contempt. (*Dean's Case*, Cro. Eliz. 689.) And the committal should be for a time certain, not "until he shall find such sureties," else a poor and friendless man might be imprisoned for life. (*Prickett* v. *Gratrex*, 8 Q. B. 1020.)

Illustrations.

Langley said to the Mayor of Salisbury whilst in the execution of his office, "Mr. Mayor, I do not care for you; you are a rogue and a rascal." *Held*, that

the words were not indictable; but that the mayor might have bound him over then and there to be of good behaviour, and ought to have done so instantly.

R. v. *Langley*, 2 Ld. Raymond, 1029; 6 Mod. 125; 2 Salk. 697; Holt, 654.

Rogers spoke unmannerly words to Sir Robert Jeffryes, an Alderman of the City of London, while he was holding a wardmote in a church. Holt, C. J., said, "No information or indictment will lie for these words. For the common law has provided a proper method for punishment of scandalous words, viz., binding to the good behaviour; such words being a breach of the peace."

R. v. *Rogers*, 2 Ld. Raym. 777; 7 Mod. 28.

As to some Inferior Courts special statutes have been passed. Thus, as to County Courts, by 9 & 10 Vict. c. 95, s. 113 (County Courts, 1846), it is enacted, that "If any person shall wilfully insult the judge or any juror, or any bailiff, clerk or officer of the said court for the time being, during his sitting or attendance in court, or in going to or returning from the court, or shall wilfully interrupt the proceedings of the court or otherwise misbehave in court, it shall be lawful for any bailiff or officer of the court, with or without the assistance of any other person, by the order of the judge, to take such offender into custody, and detain him until the rising of the court; and the judge shall be empowered, if he shall think fit, by a warrant under his hand, and sealed with the seal of the [*510] court, to commit any such offender to any prison to which he has power to commit offenders under this Act (see 12 & 13 Vict. c. 101, s. 2), for any time not exceeding seven days, or to impose upon any such offender a fine not exceeding £5 for every such offence; and, in default of payment thereof, to commit the offender to any such prison as aforesaid for any time not exceeding seven days, unless the said fine be sooner paid." (See *Levy* v. *Moylan*, 19 L. J. C. P. 308; 1 L. M. & P. 307.)

A County Court judge has no power to commit in any case not within this section. (*R.* v. *Lefroy*, *Ex parte Jolliffe*, L. R. 8 Q. B. 134; 42 L. J. Q. B. 121; 21 W. R. 332; 28 L. T. 132.) Except, of course, for breach of injunction, and in other cases coming within Rules 40 and 41 of County Court Rules, 1886, Ord. XXV. (*Martin* v. *Bannister*, 4 Q. B. D. 212, 491; 48 L. J. Ex. 300; 27 W. R. 431.)

By the County Voters Registration Act, 1865 (28 Vict. c. 36), s. 16, it is declared to "be lawful for any revising barrister, whether revising the lists of a county, city, or borough, to order any person to be removed from his court who shall interrupt the business of the court, or refuse to obey his lawful orders in respect of the same; and it shall be the duty of the chief constable, commissioner, or chief officer of police of the county, city, borough, or place in which the court is held, to take care that an officer of police do attend that court during its sitting for the purpose of keeping order therein and to carry into effect any order of the revising barrister as aforesaid."

By the Petty Sessions (Ireland) Act, 1851 (14 & 15 Vict. c. 93), s. 9, it is enacted that if any person shall wilfully insult any justice or justices sitting in any court or place, or shall commit any contempt of any such court, it shall be lawful for such justice

or justices by any verbal order, either to direct such person to be removed from such court or place, or to be taken into custody, and at any time before the rising of such court, by [*511] warrant, to commit such person to gaol for any period not exceeding seven days, or to fine such person in any sum not exceeding 40*s*.

Illustrations.

In 1874 Thomas Willis claimed to vote as a freeholder ; but the revising barrister on the meagre evidence before him held that the property in respect of which he claimed was copyhold, and disallowed the vote. His cousin, William Willis, who was present in court as agent for the opposite political party, knew perfectly well that it was really freehold, but held his tongue. In 1875 Thomas Willis accordingly claimed as a copyholder. Then William came forward and produced the family title-deeds and proved clearly that the land was freehold. The revising barrister was compelled again to disallow Thomas's vote: but ordered William to be turned out of the room for not having produced this evidence in 1874. *Held*, that such expulsion was wrongful, as William's conduct in 1874, though possibly deserving of moral reprobation, was certainly no "interruption" of the proceedings of the court then being held in 1875.

Willis v. *Maclachlan*, 1 Ex. D. 376 ; 45 L. J. Ex. 689 ; 35 L. T. 218.

To persist, in spite of repeated remonstrance, in interrupting and insulting a court of petty sessions, by shouting at the bench in the most violent and unseemly manner, so that none of the justices could speak a word, is a contempt for which the court may commit to prison even a solicitor practising before them.

In re John Rea (1878), 2 L. R. Ir. 429 ; 14 Cox, C. C. 139.

A material witness against a prisoner committed for trial on a charge of felony refused to be bound over to appear at the quarter sessions to give evidence against him, saying that she would not go to Maidstone, and nobody should make her. After fully explaining the matter and expending nearly an hour in the attempt to persuade her to go, the committing magistrate issued a warrant by virtue of which she was taken to Maidstone, and gave her evidence, and the prisoner was convicted ; without her evidence he could not have been convicted. *Held*, that the arrest was lawful, by necessary implication from 1 & 2 Ph. & M. c. 13.

Bennett and wife v. *Watson and another*, 3 M. & S. 1.

The term "Inferior Court" includes the Mayor's Court, London ; the Sheriff's Court, the City of London Court of Record, the Secondary's Court, the Tolzey Court of Bristol, the Salford Hundred Court, the Court of Passage, Liverpool ; all Sheriff's Courts, all County Courts, all Courts of Quarter and Petty Sessions, all Coroners, all Revising Barristers, and in short, all *temporal* Courts not enumerated as superior Courts, *ante*, p. 502.

[*512] The Ecclesiastical Courts have no power to commit for contempt at all. All that such court can do is to signify such contempt to the Lord Chancellor, who thereupon, under 2 & 3 Will. IV. c. 93, issues a writ *de contumace capiendo* for taking the offender into custody. (*Adlam* v. *Colthurst*, L. R. 2 Adm. & Ecc. 30 ; 36 L. J. Ec. Ca. 14 ; *Ex parte Dale*, 43 L. T. 534.) But such writ will not issue if the alleged offender be a peer, a lord of Parliament, or a

member of the House of Commons (sect. 2). Note that both Mr. Long Wellesley and Mr. Lechmere Charlton were members of Parliament, and yet both were committed to the Fleet for contempt of the Court of Chancery. (2 Russ. & Mylne, 639 ; 2 Mylne & Cr. 316.) And see the remarks of Cockburn, C. J., in *Onslow's* and *Whalley's Cases*, L. R. 9 Q. B. 228, 229 ; 12 Cox, C. C. 369.

END OF VOL I.

THE LAW

OF

LIBEL AND SLANDER

THE EVIDENCE, PROCEDURE, AND PRACTICE,

BOTH IN

CIVIL AND CRIMINAL CASES,

AND

PRECEDENTS OF PLEADINGS,

WITH

A CHAPTER ON THE NEWSPAPER LIBEL AND REGISTRATION ACT, 1881.

BY

W. BLAKE ODGERS, M.A., LL.D.

LATE SCHOLAR AND LAW STUDENT OF TRINITY HALL, CAMBRIDGE,
OF THE MIDDLE TEMPLE AND THE WESTERN CIRCUIT, BARRISTER-AT-LAW.

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PART II. [*513]

ODGERS' LIBEL AND SLANDER.

PRACTICE, PROCEDURE, AND EVIDENCE.

CHAPTER XIX.

PRACTICE AND EVIDENCE IN CIVIL CASES.

An action of libel or slander should not be lightly undertaken; it is a dangerous experiment; many a plaintiff, even though nominally successful, has bitterly regretted that he ever issued his writ. Everyone who proposes to bring an action of defamation should remember that he is about to stake his reputation on the event of a lawsuit, and to invite the public to be spectators of the issue. No step, therefore, should be taken in hot haste. There are many matters which require careful consideration before an action be commenced.

Considerations before Writ.

First, is it clear that the plaintiff is the person defamed? Libels are often couched in guarded language, so that none but the initiated can tell to whom they refer. Thus, if the libel be on "a certain vicar," no individual vicar should sue, unless by other passages in the libel he is unmistakeably identified; otherwise he will be "putting the cap on his own head." It is not enough that one or two of the plaintiff's dearest friends feel convinced that he is the person aimed at; he should not sue unless his acquaintances generally have reasonably arrived at the same conclusion.

Next, is the charge, or any part of it, true? If so, the plaintiff, by bringing an action takes the surest method of advertising his own disgrace. When once the action is brought and a justification [* 514] pleaded, no honourable compromise can be effected; the matter must be fought out to the bitter end; and every detail will become matter of "town talk." It would be better, therefore, for such a plaintiff to affect an indifference which he does not feel, and treat the libel as "beneath contempt."

And even if the charge itself be false, still if the plaintiff has been at all to blame in the matter, if his conduct, though not morally reprehensible, has yet been indiscreet or unbecoming, or

such as would naturally lead people to make unkind remarks, it will be better for him not to sue. He will have to be cross-examined in open court, and every admission wrung from him will be published in all the county papers; the blackest motives will be imputed to him, and the worst possible construction be put upon his conduct. And although the verdict be ultimately in the plaintiff's favour, many of his acquaintances will remember with pleasure to their dying day what a sorry figure he cut in the box.

The plaintiff should also consider whether he has not by his own conduct brought the libel or slander on himself. (See *Davis* v. *Duncan*, L. R. 9 C. P. 396; 43 L. J. C. P. 185; 22 W. R. 575; 30 L. T. 464; *ante*, p. 52.) Sometimes it is a defence to an action that the plaintiff challenged or invited the defendant's attack (*ante*, p. 232); and in every case the defendant may show in mitigation of damages the provocation given by the plaintiff (*ante*, p. 318). A man who has commenced a newspaper controversy comes with a very bad grace to the law courts for assistance against too powerful an adversary. If both parties are to blame, the result of the trial is generally:—Damages, one farthing; each party to pay his own costs.

And wholly apart from the above considerations, is it worth while to bring an action? Is the matter sufficiently serious? A man does not advance either his dignity or his reputation by showing himself too sensitive to calumny. People will think that he is eager for litigation, because he knows that his character cannot stand the least wear and tear. This remark applies especially to actions of slander. It is not wise to inquire too curiously what others say of us behind our backs. The slander is only heard by few; it will soon be forgotten; whereas if you bring an action, it will be disseminated throughout the country, and recorded in a permanent shape. Still it may be a man's duty to take proceedings, if the charge made against him be really serious.

Even, however, in cases of libel, it is better to exhaust every other method first. If the libel has appeared in a newspaper, write to the editor a calm and dignified letter in answer, avoiding all "smart writing," [* 515] and indulging in no *tu quoque*. This will probably bring an apology from the writer of the original letter. And a prompt apology and retractation of the charge is always worth more to a plaintiff than any amount of damages. If, however, no apology comes, but another letter worse than the first, the plaintiff's position is improved thereby; for defendant's persistence in the charge after the explanation afforded is evidence of malice, entitling the plaintiff to heavy damages.

Next, before issuing a writ, the plaintiff should make sure what were the defendant's exact words. Of a libel, a copy can as a rule be easily obtained; but with slanders it is different. What has reached the plaintiff's ears may be a highly exaggerated version of what the defendant actually said. The plaintiff is usually the last person who hears the charge against him; and it has probably grown on each repetition; words not actionable *per se* are frequently converted into actionable words in the intermediate process. The

person slandered should, therefore, take a friend with him (who will make a good witness) and go and ask the alleged slanderer :— "Is it true that you have been saying this of me?" If he denies that he ever said so, as is very possible, appear at all events to believe him, and bring no action ; if he confesses that he did say so, but has since discovered he was mistaken, get him to write you a letter acknowledging his error, to show anyone if necessary, and then forgive him. If, however, he admits that he said so and reiterates the charge, then you are provided by anticipation with the best possible evidence of publication—an admission by the defendant. Lord Denman says, in *Griffiths* v. *Lewis*, 7 Q. B. 61 ; 14 L. J. Q. B. 199 ; 9 Jur. 370, "It is never wise to bring an action for slander unless some such course has been taken." See his remarks, *ante*, p. 235.

As soon as it is clear what is the precise charge made by the defendant, the next question will be :—Are the words actionable ? On this point the plaintiff should consult his solicitor, who should consult c. II. *ante*, pp. 17—92. If the words are not actionable without special damage, the plaintiff must wait for some damage to accrue before commencing his action.

Parties.

Next, it must be determined who is the right plaintiff, and who the proper defendant ; as to which see c. XIV., *ante*, pp. 394—421. Formerly the law and practice as to "parties" was of the utmost importance, misjoinder of a plaintiff being ground of nonsuit, while non-joinder of a necessary plaintiff was the subject of a plea in abatement. But now, by Order XXI. r. 20, "No plea or defence shall be [*516] pleaded in abatement," and in Order XVI. r. 11, the general principle is laid down, that "No cause or matter shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every cause or matter deal with the matter in controversy, so far as regards the rights and interests of the parties actually before it. The court or a judge may, at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court or a judge to be just, order that the names of any parties improperly joined, whether as plaintiffs or as defendants, be struck out, and that the names of any parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the action, be added." And see rr. 1, 2 of the same Order. But such amendment will not as a rule be allowed where the party applying for it is clearly to blame, or where a hardship would be inflicted on his opponent. And even when an order is made, it will generally be only upon payment of all costs thereby occasioned. Hence this branch of the law still deserves careful consideration.

The non-joinder of a defendant in an action of tort never was any ground of objection ; the present defendant cannot plead in abate-

ment or in bar that another joint wrongdoer has not been made a co-defendant (*Mitchell* v. *Tarbutt and others*, 5 T. R. 649 ; *Ansell* v. *Waterhouse*, 6 M. & S. 385) ; for all persons engaged in a common wrongful act are liable jointly and severally for the consequent damage. (Co. Lit. 232 a ; 1 Wms. Saund. 291 f ; *Sutton* v. *Clarke*, 6 Taunt. 29.) So, too, the misjoinder of one defendant would not avail the others ; it would only entitle the defendant misjoined to a verdict in his favour. (*Morrow* v. *Belcher and others*, 4 B. & C. 704 ; *Govett* v. *Radnidge and others*, 3 East, 62 ; *Bretherton and others* v. *Wood*, 3 B. & B. 54.) And this is confirmed by Ord. XVI. rr. 4, 5 and 7. But the plaintiff will have to pay the costs of the defendant who proves not liable, unless such defendant has colluded with the other defendant found to be liable, or has otherwise been guilty of misconduct ; so that it is undesirable to join any defendant who is not liable for the publication sued on.

In cases of slander where special damage is essential to the action, be careful to sue only that person whose utterance of the slander actually caused the special damage. Do not sue the originator of the falsehood, if his utterance of it has produced no direct injury to the plaintiff. In cases where a libel has been written by one man at the direction of another, it is often wise to sue the person who actually [*517] wrote the libel as well as his master or employer. For, so, although the plaintiff may fail to prove agency at the trial, he will yet be entitled to judgment against the clerk or servant.

Where a libel has appeared in a newspaper, the person defamed can sue the proprietor, the editor, the printer, and the publisher, or any one or more of them. But there is no object, as a rule, in having more than one defendant, or bringing more than one action for the same libel ; (see, however, *Tucker* v. *Lawson*, 2 Times L. R. 593 ; and *Colledge* v. *Pike*, 56 L. T. 124.) It is usual to sue only the proprietor, as his name and address can be ascertained at once at the Somerset House, Room No. 7, and the fact that he is the proprietor can be easily proved by the production of a certificate under sect. 15 of the Act of 1881. If the action be originally brought against the publisher only a master at chambers will subsequently, on proper terms, join the proprietor as a co-defendant. (*Edward* v. *Lowther*, 45 L. J. C. P. 417 ; 24 W. R. 434 ; 34 L. T. 255.) The plaintiff, however, generally and naturally prefers to sue the author. Hence his solicitor frequently writes to the editor of the paper before issuing the writ demanding the writer's name and address. This information the editor will, as a rule, refuse to give. Editors generally regard it as a point of honour not to disclose the name of any contributor. In *Harle* v. *Catherall and others*, 14 L. T. 802, Martin, B., says, "When a man went to an editor to ask for the name of an anonymous correspondent, no blame attached to the editor for refusing to give the name. Indeed, an editor would almost be mad to do so. He should blame no editor for so refusing." The plaintiff must in such a case be content to sue the proprietor of the paper, who generally obtains an indemnity from the writer. And the plaintiff can not, in such action, compel the pro-

prietor to produce the original manuscript so that he may recognize the handwriting ; at all events, not before delivery of the statement of claim. (*British and Foreign Contract Co.* v. *Wright*, 32 W. R. 413.) The printer of a libel, on the other hand, will generally disclose the name of his employer ; there is no reason why he should not ; and see the statute 39 Geo. III. c. 79, s. 29, *post*, p. 711.

Letter before Action.

In all cases, before actually issuing a writ, the plaintiff's solicitor should write to the defendant, demanding an apology and threatening proceedings. Say nothing in this letter about costs. If the charge was made publicly, a public apology should be demanded, to be advertised in a newspaper. If only a few heard it, the plaintiff should be [* 518] content with a letter of apology, fully retracting the charge, which can be shown to every one who heard what the defendant said.

Notice of Action.

Sometimes besides the letter before action it is necessary to give a formal notice of action a month and a day before the writ is issued, *e. g.*, where a libel is written by any one acting *bonâ fide* in the execution of any statutory duty. (*Murray* v. *McSwiney*, Ir. R. 9 C. L. 545 ; 5 & 6 Vict. c. 97, s. 4.) In such cases, a letter asking for the name of the writer's informant, and threatening proceedings if the name be not disclosed, will not be a sufficient notice within the statute. (*Norris* v. *Smith*, 10 A. & E. 188.) See form of such notice, Precedent No. 19, *post*, p. 631.

Jurisdiction.

An action of libel or slander can *primâ facie* be tried by any court within whose jurisdiction the defamatory words were uttered, written, printed, or published in any way. And a letter is deemed to be published both where it is posted and where it is received and opened. (*R.* v. *Burdett*, 4 B. & Ald. 95.) But when the words are not actionable *per se*, there must be special damage ensuing to constitute a cause of action. In the case of an Inferior Court the *whole* cause of action must as a rule arise within its jurisdiction. (*Gold* v. *Turner*, L. R. 10 C. P. 149 ; 23 W. R. 732 ; *Allerton* v. *Archer*, 14 Q. B. D. 1 ; 54 L. J. Q. B. 12 ; 33 W. R. 136 ; 51 L. T. 661.) Hence an Inferior Court will not have jurisdiction unless both the publication and the special damage occurred within its district. (*Littleboy* v. *Wright*, 1 Lev. 69 ; 1 Sid. 95.) But in a Superior Court it is *primâ facie* sufficient if either the publication or the consequent special damage occurred within its jurisdiction (*Bree* v. *Marescaux*, (C. A.) 7 Q. B. D. 434 ; 50 L. J. Q. B. 676 ; 29 W. R. 858 ; 44 L. T. 644, 765) ; and this whether either party be a British subject or an alien. Again, the Supreme Court of Judicature in England has a general jurisdiction over all torts com-

mitted by one Englishman to another in any corner of the world, whether in an English Colony (*Wyatt* v. *Gore*, Holt, N. P. 299; *ante*, p. 315) or in a foreign country (*Scott* v. *Lord Seymour*, 1 H. & C. 219; 31 L. J. Exch. 457; 32 L. J. Exch. 61; 8 Jur. N. S. 568; 10 W. R. 739; 6 L. T. 607).

But the Court of its own accord restricted these wide powers to cases in which the defendant is within jurisdiction at the time the writ is issued, so that it can be served upon him here. If the defendant is out of jurisdiction, no writ can be issued except by leave [*519](Order II. r. 4), and such leave will only be granted in the cases specified in Order XI. (*In re Eager*, *Eager* v. *Johnstone*, (C. A.) 22 Ch. D. 86; 52 L. J. Ch. 56; 31 W. R. 33; 47 L. T. 685), which greatly limits the powers formerly possessed by the Court. The effect of this Order is practically to prevent any action being brought here for damages for any libel or slander published abroad, and also for any libel or slander published here by a person ordinarily resident abroad, unless he happens to come to England, so that personal service can be effected. The fact that a newspaper published abroad has a branch office in this country will not enable a plaintiff to serve a writ at the branch office without leave under this rule. (*Jones* v. *Scottish Accident Insurance Co. Limited*, 17 Q. B. D. 421; 55 L. J. Q. B. 415; 55 L. T. 218; *Baillie* v. *Goodwin & Co.*, 33 Ch. D. 604; 55 L. J. Ch. 849; 34 W. R. 787; 55 L. T. 56.) There can be no substituted service of a writ in an action where there cannot in law be personal service of the writ. (*Field* v. *Bennett*, 56 L. J. Q. B. 89.) And if the words be spoken out of jurisdiction, the fact that they incidentally affect property within jurisdiction is not sufficient to bring the case within Order XI. (*Casey* v. *Arnott*, 2 C. P. D. 24; 46 L. J. C. P. 3; 25 W. R. 46; 35 L. T. 424.)

But the plaintiff will be entitled to leave under Order XI. r. 1 (*f*) if he adds a claim for an injunction on his writ. (*Tozier and Wife* v. *Hawkins*, 15 Q. B. D 650, 680; 55 L. J. Q. B. 152; 34 W. R. 223.) And it has been held that it is not necessary that he should ask for an injunction only; he may claim other relief as well. (*Lisbon-Berlyn Gold Fields Limited* v. *Heddle*, 52 L. T. 796.) But the judge at chambers, when granting leave to serve the writ out of jurisdiction, may, if he think fit, limit the plaintiff to that portion of his claim in respect of which it shall appear at the trial that the writ could have been properly served out of jurisdiction. (*Thomas* v. *Duchess Dowager of Hamilton*, (C. A.) 17 Q. B. D. 592; 55 L. J. Q. B. 555; 35 W. R. 22; 55 L. T. 219, 385.) The court will, in a proper case, give leave for the issue of a concurrent writ for service out of jurisdiction, although the original writ was issued for service within jurisdiction. (*Smalpage* v. *Tonge*, (C. A.) 17 Q. B. D. 644; 55 L. J. Q. B. 518; 34 W. R. 768; 55 L. T. 44.)

Choice of Court.

Next, in what court shall the action be brought? The County Court has no jurisdiction (9 & 10 Vict. c. 95, s. 58), unless by consent of both parties (19 & 20 Vict. c. 108, s. 23); although the action may

[*520] subsequently be remitted to the County Court (see *post*, pp. 526—8). Where the particulars before a County Court judge disclose a cause of action for libel or slander, he has no power to amend them so as to give himself jurisdiction, *e.g.*, by turning the case into an action for false imprisonment. (*Hopper* v. *Warburton*, 7 L. T. 722.) The Courts of Equity before the Judicature Act had no cognizance over libels or slander, whether public or private, except as contempt of their own courts. (*Roach* v. *Garvan*, *Re Read and another*, 2 Atk. 469 ; 2 Dick. 794.) The Chancery Division now undoubtedly has jurisdiction to try a case of libel. (*Thomas* v. *Williams*, 14 Ch. D. 864 ; 49 L. J. Ch. 605 ; 28 W. R. 983 ; 43 L. T. 91.) But it is obviously inexpedient to commence such an action there ; for libel or no libel is peculiarly a question for a jury. In *Thomas* v. *Williams*, the defendant never expressed a wish for a jury till the whole of the evidence on both sides had been put in ; had he applied sooner, Fry, J., would have changed the mode of trial. (See 14 Ch. D. 871.) If an injunction be desired, it can be obtained as readily in one Division as in the other. For every reason, therefore, it is best to issue the writ in the Queen's Bench Division of the High Court of Justice.

If, however, the defendant be an undergraduate resident within the University of Oxford or Cambridge, he must be sued in the University Court, although the plaintiff be in no way connected with the University or resident within its limits, and although the libels complained of appeared in several London newspapers. (*Ginnett* v. *Whittingham*, 16 Q. B. D. 761 ; 55 L. J. Q. B. 409 ; 34 W. R. 565.)

Statute of Limitations.

It is seldom that a plaintiff in an action of defamation allows his remedy to be barred by lapse of time. He is generally too eager to commence proceedings, and will not wait till the special damage has fully accrued. (See *Ingram* v. *Lawson*, 6 Bing. N. C. 212 ; 8 Scott, 471 ; 9 C. & P. 326 ; 4 Jur. 151 ; *Goslin* v. *Corry*, 7 M. & Gr. 342; 8 Scott, N. R. 21.) Still, the Duke of Brunswick waited nearly eighteen years ; it may be as well therefore to state that an action of slander for words actionable *per se* must be brought "within two years next after the words spoken, and not after" (21 Jac. I. c. 16, s. 3), and that an action for libel or of *scandalum magnatum* must be brought within six years from the date of publication. (*Lord Say & Seal* v. *Stephens*, cited Cro. Car. 535 ; Litt. 342.) Whenever the words are actionable only by reason of special damage, the time does not begin to run till the damage has actually been sustained. (*Saun-*
[* 521] *ders* v. *Edwards*, 1 Sid. 95 ; 1 Keble, 389 ; Sir T. Raym. 61 ; *Littleboy* v. *Wright*, 1 Lev. 69 ; 1 Sid. 95 ; *Darley Main Colliery Co.* v. *Mitchell*, (H. L.) 11 App. Cas. 127 ; 55 L. J. Q. B. 529 ; 54 L. T. 882.) And then I presume the plaintiff has six years within which to sue and not merely *two*, as the 21 Jac. I. c. 16, does not apply ; but see *Littleboy* v. *Wright*, *supra*. Lord Campbell was evidently under a misapprehension as to the effect of stat. 21 Jac.

I. c. 16, in his remarks in 9 H. L. C. p. 513. In all other cases the time runs from the date of publication, unless indeed the party then entitled to bring the action be under any disability, or be beyond the seas (21 Jac. I. c. 19, s. 7 ; 4 & 5 Anne, c. 3 (al. c. 16), s. 19 ; 3 & 4 Will. IV. c. 42, s. 7 ; 19 & 20 Vict. c. 97, s. 12). But if once such disability be removed and the time begin to run, nothing afterwards can stop it.

But the publication relied on to oust the statute need not be the original or substantial publication. Thus, if any agent of the plaintiff can induce the defendant to sell him an old copy of the libel, published many years ago, such second publication, although contrived by the plaintiff for the very purpose, will be sufficient to disprove the plea of the Statute of Limitations. And that plea being once ousted the jury will not be confined, it is said, to that single publication within the six years, but may take all the circumstances into their consideration. (*Duke of Brunswick* v. *Harmer*, 14 Q. B. 185 ; 19 L. J. Q. B. 20 ; 14 Jur. 110 ; 3 C. & K. 10.)

Former Proceedings.

That a previous action has already been brought and damages recovered against the same defendant for the same words is a bar to any subsequent action, even though fresh damage has since arisen therefrom. (*Ante*, p. 295.) For the jury in the former action must be taken to have assessed the damages once for all ; and the probability or possibility that this subsequent damage would follow should have been submitted to their consideration then. Whether this is so, when the words are not actionable in themselves, may be doubted. (See *ante*, p. 306.) So if the prior action was unsuccessful, this will also be a bar to the action ; unless, indeed, the plaintiff was only nonsuited on some technical ground, and the judge, in giving judgment of nonsuit, expressly declared that it was a common law nonsuit, and that the plaintiff might bring a second action.

But it must be clear that the cause of action is the same in both cases. Thus, where the declaration in an action of slander alleged that the defendant spoke of the plaintiff, *in the way of his trade*, the words, "He cheated me ;" "He is a thief, and robbed me of £100 ;" and [*522] contained an averment of special damage, the defendant pleaded a former judgment recovered for the same grievances ; but the record of the previous action showed the slanderous words to have been, "That thief is a villain, a scoundrel, and a rascal, and I can prove him a thief at any moment ;" and it neither alleged that the words were spoken of the plaintiff in the way of his trade, nor contained an averment of special damage. This was held to be no bar to the action. "I cannot think," said Crompton, J., "that the cause of action in that record which contains words charging the plaintiff with felony is the same cause of action as that in the present declaration, which imputes a charge against the plaintiff as a trader." (*Wadsworth* v. *Bentley*, 23 L. J. Q. B. 3 ; 17 Jur. 1077 ; 2 C. L. R. 127 ; 1 B. C. Cases (L. & M.) 203.)

So, too, a previous recovery against another person may be a bar to the present action, if the former defendant was *jointly* concerned with the present defendant in the very publication now sued on. Thus, if A. & B. be in partnership, either as printers or publishers of a newspaper, a previous judgment recovered against A. would be a bar to any action against B. for the same libel, even though the judgment obtained in the prior action be not satisfied. (*Brown* v. *Wootton*, Cro. Jac. 73 ; Yelv. 67 ; Moo. 762 ; *King* v. *Hoare*, 13 M. & W. 494, 504 ; *Duke of Brunswick* v. *Pepper*, 2 C. & K. 683 ; *Brinsmead* v. *Harrison*, L. R. 7 C. P. 547 ; 41 L. J. C. P. 190 ; 20 W. R. 784 ; 27 L. T. 99 ; *Munster* v. *Cox*, 1 Times L. R. 542.) But this is only because they ought to have been sued jointly, and could even before the Judicature Act have been so sued. Where two are *severally* liable, judgment against one is no bar to an action against the other. Thus, a previous judgment against the proprietor of a newspaper, even though satisfied, is no bar to an action for the same libel against the author. (*Frescoe* v. *May*, 2 F. & F. 123.) *A fortiori* the fact that heavy damages have been recovered against one newspaper is no bar to an action against another newspaper which has published the same libel. The defendant cannot give evidence in chief of such previous recovery even in mitigation of damages (*Creevy* v. *Carr*, 7 C. & P. 64) ; nor of the fact that other actions are pending. (*Harrison* v. *Pearce*, 1 F. & F. 567 ; 32 L. T. (Old S.) 298.) In America, it seems, no judgment against another will be a bar, unless it be satisfied. (*Lovejoy* v. *Murray*, 3 Wallace (Supr. Ct.) 1 ; *Thomas* v. *Rumsay*, 6 Johns. (N. Y.) 26 ; *Brown* v. *Hirley*, 5 Upper Canada, Q. B. Rep. (Old S.) 734 ; *Breslin* v. *Peck*, 38 Hun. (45 N. Y. Supr. Ct.) 623.)

That former criminal proceedings have been taken by way of indictment for the same libel is no bar to an action, whether the prisoner was acquitted or convicted (*Peacock* v. *Reynal*, 2 Brownlow [*523] and Goldesborough, 151 ; 16 M. & W. 825, n.) ; though I should not advise such an action in either case, except under very special circumstances. But if the former criminal proceedings were taken by way of criminal information, then, if the rule *nisi* has been made absolute, clearly no civil action can be brought (*R.* v. *Sparrow*, 2 T. R. 198) ; and probably not if the rule was discharged on showing cause, all the courts at Westminster being now merged in one (*Wakley* v. *Cooke and another*, 16 M. & W. 822 ; 16 L. J. Ex. 225) ; unless the court thought a civil action the more appropriate remedy, and discharged the rule in order that civil proceedings might be taken. (*Ex parte Hoare*, 23 L. T. 83.)

Joinder of Causes of Action.

The Judicature Act gives a plaintiff very wide powers of joining several causes of action in one writ ; but as a rule, in cases of libel and slander the plaintiff should not avail himself of these provisions. Defamation is a matter *sui generis*, and it would be imprudent to complicate the issue by joining irrelevant claims. Of course any number of libels or slanders published by the same defendant may

well be sued for in the same action, unless they be wholly disconnected. So, too, a claim for malicious prosecution, or wrongful dismissal, or even assault, may be joined, if it arises out of the same circumstances, and will be substantiated by the same witnesses, as the claim for libel or slander. Thus, where the plaintiff alleged that a foreign merchant and his Manchester agent had conspired to libel the plaintiff in the way of his trade, the court allowed this joint cause of action to be joined with claims against each defendant severally for the same libels or other similar ones. (*Desilla* v. *Schunck & Co. & Fels & Co.*, Weekly Notes, 1880, p. 96.)

Claims by plaintiffs jointly may be joined with claims by them or any of them separately against the same defendant (Order XVIII. r. 6). Claims by or against husband and wife may be joined with claims by or against either of them separately (Order XVIII. r. 4). But these rules are expressly declared (r. 7) to be subject to rr. 1, 8, 9, of the same Order, which enact that if a plaintiff unites in the same action several causes of action which cannot be conveniently tried or disposed of together, a master or district register, on the application of the defendant, may strike out some of such causes of action, or order separate trials to be had.

Endorsement on Writ.

The writ must be endorsed with a plain statement of the nature of the action :—*e. g.*, "The plaintiff's claim is for damages for libel" or [*524] "for slander" or "for libel and slander." The words "and for an injunction" may be added ; see *ante*, p. 340. But in cases of newspaper libel, it is as well to give more particulars :—"The plaintiff's claim is for damages for a libel published by the defendant in the ——— *Gazette* for Friday, November 5th, 1880." This fuller form is useful as identifying the libel in case judgment should be allowed to go by default.

It is not necessary to state what sum is asked as damages ; for they must always be unliquidated in these actions. But if the plaintiff does so, he should be sure to ask enough, for although he may recover *less*, he cannot recover *more*, than the sum claimed on the writ ; unless the judge at the trial will consent, after verdict, to amend the writ under Order XXVIII. r. 1. At the same time it is foolish to claim an extravagant amount, as this may prevent an advantageous settlement.

Matters to be considered by the Defendant.

The defendant should, at the earliest moment after being served with the writ, consider the advisability of apologising. If he is in the wrong, he ought to admit it at once. In the case of a newspaper, it is particularly desirable that this question should be dealt with at once, in order that the apology, if any, may be published in the next issue of the paper.

A prompt apology will, as a rule, put an end to the action. It is very difficult for the plaintiff to disregard it ; if he does, the sym-

pathies of judge and jury will probably be with the defendant. But such apology must be frank and full. A guarded, half-hearted apology will only injure defendant's position. It is no use to publish a paragraph expressing astonishment at the receipt of a lawyer's letter, and attempting to explain away or minimise an imputation clearly made. It is still worse to assert, as is sometimes done, that defendant has done the plaintiff a kindness in making a false charge against him, as it "has afforded him an opportunity of publicly denying it." See the remark of Mellor, J., L. R. 1 Q. B. 701. A so-called apology is not an apology at all, unless it unreservedly withdraws all imputations and expresses regret for having made any. If defendant apologises at all, he should do so freely and handsomely, as well as promptly.

Whether he has apologised or not, defendant should enter an appearance to the writ. He should not allow judgment to go by default, unless he is utterly and hopelessly in the wrong, and at the [*525] same time there is no hope of a compromise. If he has no defence, he should apologise and pay money into court as amends. This he can do at any stage of the action; and the earlier it is done, the better for the defendant. He can give the plaintiff the notice in Form No. 3, Appendix B, referred to in Order XXII. r. 4. In most cases it is idle to pay into court a contemptuous sum, such as a farthing or a shilling; it must be at least 40*s.*

If, however, the action is one that should be fought, the defendant should consider whether the plaintiff has properly shaped his claim, and also whether security cannot be obtained for costs. As to security, see Order LXV. r. 6a; Rules of December, 1885, r. 42; and *Pisani* v. *Lawson*, 5 Scott, 418; 6 Bing. N. C. 90. If in the same action claims by the plaintiffs jointly be combined with claims by them or any of them separately, the defendant may apply to have them severed, on the ground that they cannot be conveniently disposed of in the same action. (Order XVII. rr. 1, 7, 8, 9.) If, on the other hand, two or more actions be unnecessarily brought against the same defendant, either alone or with others for the same words, or for separate publication of similar words, or for two distinct libels or slanders or for a libel and a slander all arising out of the same transaction and intimately connected with each other, a master at chambers will consolidate the actions. (Order XLIX. r. 8; *Whiteley* v. *Adams*, 15 C. B. N. S. 392; *Jones* v. *Pritchard*, 18 L. J. Q. B. 104; 6 D. & L. 529.) An application for consolidation may be made at any time after service of the writs, and without any consent on the plaintiff's part. (*Hollingsworth* v. *Brodrick*, 4 A. & E. 646; 6 N. & M. 240; 1 H. W. 691.) Where a plaintiff who had already recovered £3,100 damages in actions against three newspapers, brought seventeen more actions against other newspapers who had copied the same libel, the court refused to consolidate, the publications being distinct, and the circumstances attending each being different, but stayed sixteen out of the seventeen actions on terms. (*Colledge* v. *Pike*, 56 L. T. 124.)

That the plaintiff is an outlaw is ground for staying proceedings. (*R.* v. *Lowe and Clements*, 8 Ex. 697; 22 L. J. Ex. 262.) But such

stay will be removed on the reversal of the outlawry. (*Somers* v. *Holt*, 3 Dowl. 506.) But now no person can be outlawed in any civil proceeding. (42 & 43 Vict. c. 59, s. 3.)

If the alleged libel was published by order of either House of Parliament, all proceedings will be stayed at once on production of a certificate to that effect by the Clerk of the House, with an affidavit verifying such certificate. (3 & 4 Vict. c. 9; Appendix D., *post*, p. 715.

[*526.] *Judgment by Default.*

If the defendant fails to appear to the writ, the plaintiff must file an affidavit of due service (Order XIII. r. 2), and he will then be entitled to sign interlocutory judgment, and a writ of inquiry will issue to the sheriff bidding him summon a jury to assess the damages. As there is no statement of claim, the plaintiff should give the defendant formal notice a reasonable time before the hearing that he intends to offer before the under-sheriff evidence of such and such special damage. Similarly a writ of inquiry will issue if defendant does not deliver any defence. (Order XXVII. r. 4.). The inquiry is conducted in the same way as a trial at Nisi Prius: the only difference is that the plaintiff *must* recover some damages, though as a rule he does not recover such heavy damages from a sheriff's jury as after a full trial at Nisi Prius. Rules, 14, 15, 19, 34, 35, 36 and 37 of Order XXXVI. apply to an inquiry. The plaintiff need not adduce any evidence at all, but merely put in the libel. And the jury will not in such a case be bound to give him nominal damages only. (*Tripp* v. *Thomas*, 3 B. & C. 427; 1 C. & P. 477). If the defendant desires to have the damages reduced, he must move for a new trial within the prescribed time. Where a sheriff's jury had assessed the damages at one shilling only, Field, J., at chambers, deprived the plaintiff of his costs. (*Gath.* v. *Howarth*, Weekly Notes, 1884, p. 99; Bitt. Ch. Cas. 79.) The under-sheriff apparently is not a "judge by whom a matter or issue is tried with a jury" within the meaning of Order LXV. r. 1, and has no power therefore to order that the costs shall not follow the event (*ib*).

Remitting the Action to the County Court.

By virtue of sect. 10 of the County Courts Act, 1867 (30 & 31 Vict. c. 142):—"It shall be lawful for any person against whom an action for . . . libel, slander . . . or other action of tort may be brought in a Superior Court, to make an affidavit that the plaintiff has no visible means of paying the costs of the defendant should a verdict be not found for the plaintiff; and thereupon a judge of the court in which the action is brought shall have power to make an order that unless the plaintiff shall, within a time to be therein mentioned, give full security for the defendant's costs to the satisfaction of one of the masters of the said court, or satisfy the judge that he has a cause of action fit to be prosecuted in the Superior Court, all pro-

ceedings in the action shall be stayed ; or in the event of the plaintiff being unable or unwilling to give such security, or failing to satisfy [* 527] the judge as aforesaid, that the cause be remitted for trial before a County Court to be therein named ; and thereupon the plaintiff shall lodge the original writ and the order with the registrar of such County Court, who shall appoint a day for the hearing of the cause, notice whereof shall be sent by post or otherwise by the registrar to both parties or their attorneys ; and the County Court so named shall have all the same powers and jurisdiction with respect to the cause as if both parties had agreed, by a memorandum signed by them, that the said County Court should have power to try the said action, and the same had been commenced by plaint in the said County Court ; and the costs of the parties in respect of the proceedings subsequent to the order of the judge of the Superior Court shall be allowed according to the scale of costs in use in the County Courts, and the costs of the proceedings in the Superior Court shall be allowed according to the scale in use in such latter court."

It is expressly enacted by the Judicature Act, 1873, s. 67, that the provisions of this section shall apply "to all actions commenced in the High Court of Justice *in which any relief is sought which can be given in a County Court.*" The words in italics have been much discussed in *Garnett* v. *Bradley*, (C. A.) 2 Ex. D. 349 ; 46 L. J. Ex. 545 ; 25 W. R. 653 ; 36 L. T. 725 ; (H. L.) 3 App. Cas. 944 ; 48 L. J. Ex. 186 ; 26 W. R. 698 ; 39 L. T. 261 ; and the other decisions as to costs ; and were held, when taken with Order LXV. r. 1, to confine the operation of the County Courts Act, 1867, to actions which can be commenced in the County Court. But it could hardly, I think, be contended that sect. 10 applies only to actions of tort which can be commenced in the County Court, as it expressly mentions "libel" and "slander." And as a matter of practice actions of defamation are constantly remitted to the County Court under this section. And now see *Stokes* v. *Stokes* (June 7th, 1887), Weekly Notes, p. 116.

The application can be made at any stage of the action ; but only by the defendant. He must make an affidavit, showing a good defence on the merits, that the plaintiff has no visible means, and that there will be a saving of costs, and greater convenience in trying in the County Court. But no order will be made (1) if the action is one fit to be prosecuted in the Superior Court, because involving important points of law, or because it is a test action, &c. (see *Critchley* v. *Brown*, 2 Times L. R. 238) ; or (2) if the plaintiff can prove that he has visible means of paying costs. "Visible" means tangible, such property as the defendant could reach in the event of his obtaining judgment for his costs. (*Counsel* v. *Garvie*, Ir. R. 5 C. L. 74 ; *Watson* v. *McCann*, 6 L. R. Ir. 21 ; and see *Sykes* v. *Sykes*, L. R. 4 [* 528] C. P. 645 ; 38 L. J. C. P. 281 ; 17 W. R. 799 ; 20 L. T. 663.) The plaintiff also generally denies that there will be any saving of costs or convenience in trying in the County Court. It is practically useless for a defendant to appeal from the master's order. (*Palmer* v. *Roberts*, 22 W. R. 577, n. ; 29

L. T. 403.) The plaintiff may appeal if the order is *obviously* wrong. (*Jennings and wife* v. *London General Omnibus Co.*, 30 L. T. 266; *Owens* v. *Woosman*, L. R. 3 Q. B. 469; 9 B. & S. 243; 37 L. J. Q. B. 159; 16 W. R. 932; L. T. 357; *Holmes* v. *Mountstephen*, L. R. 10 C. P. 474; 33 L. T. 351.)

If an order be made remitting the action its effect is practically to transform the action into a County Court cause. As to the further conduct of the action, see *post*, p. 585.

Statement of Claim.

The defendant, on appearance, should require a statement of claim. And even if he does not, I should advise plaintiff still to deliver one, as no taxing-master would ever consider the delivery of a statement of claim in an action of libel or slander to be "unnecessary or improper." (Ord. XX. r. 1.)

The very words complained of must be set out by the plaintiff in his statement of claim, "in order that the court may judge whether they constitute a ground of action" (per Lord Tenterden, 3 B. & Ald. 506), and also because "the defendant is entitled to know the precise charge against him, and cannot shape his case until he knows." (Per Lord Coleridge, in *Harris* v. *Warre*, 4 C. P. D. 128; 48 L. J. C. P. 310; 27 W. R. 461; 40 L. T. 429.) It is not sufficient to give the substance or purport of the libel or slander with innuendoes. (*Newton* v. *Stubbs*, 8 Mod. 71; *Cooke* v. *Cox*, 3 M. & S. 110; *Wood* v. *Brown*, 6 Taunt. 169; *Wood* v. *Adam*, 6 Bing. 481; *Wright* v. *Clements*, 3 B. & Ald. 503; *Saunders* v. *Bate*, 1 H. & N. 402; *Solomon* v. *Lawson*, 8 Q. B. 823; 15 L. J. Q. B. 253; 10 Jur. 796.) So, too, in cases of slander of title the words must be set out *verbatim*. (*Gutsole* v. *Mathers*, 1 M. & W. 495; 1 Tyrw. & Gr. 694; 5 Dowl. 69; 2 Gale, 64.) Ord. XIX. r. 21 does not apply; for the precise words are most material. (*Harris* v. *Warre*, *supra*.) The defendant may be interrogated as to the exact words he uttered if the plaintiff cannot otherwise discover them (*Atkinson* v. *Fosbroke*, L. R. 1 Q. B. 628; 35 L. J. Q. B. 182; 14 W. R. 832; 14 L. T. 553); but not *before* he delivers his statement of claim, except in very special circumstances. (*Strange* v. *Dowdney*, 38 J. P. 724, 756.) It will generally be safer and cheaper in the end to deliver a claim, and subsequently, after discovery, to amend it, if necessary. If the words [*529] are in a foreign language, they should be set out *verbatim* in such language. (*Zenobio* v. *Axtell*, 6 T. R. 162; 3 M. & S. 116. And see *R.* v. *Manasseh Goldstein*, 3 Brod. & B. 201; 7 Moore, 1; 10 Price, 88; R. & R. C. C. 473.) And an exact translation should be added. Take care not to translate actionable words into non-actionable, as was done in *Ross* v. *Lawrence*, (1651), Sty. 263. It was formerly necessary to aver expressly in the case of foreign words that those present understood them. (*Jones* v. *Davers*, Cro. Eliz. 496; *Price* v. *Jenkings*, Cro. Eliz. 865; and per Williams, J., in *Amann* v. *Damm*, 8 C. B. N. S. 597; 29 L. J. C. P. 313; 7 Jur. N. S. 47; 8 W. R. 470.) No such averment is now essential; though the fact

must of course still be proved at the trial. (*Ante*, p. 109; and see Precedents of Pleadings, Appendix A, No. 2.)

If the slander was contained in a question, it must be set out as a question, and not as a fact affirmed. (*Barnes* v. *Holloway*, 8 T. R. 150.) So, if the slander consists in the answer to a question, and the answer alone is unintelligible, both question and answer should be set out exactly as they were spoken. (See *Bromage* v. *Prosser*, 4 B. & C. 247.) So, if the words were "Woor says M'Pherson is bankrupt," they must be set out; if the declaration alleged that the defendant had said "M'Pherson is bankrupt" merely, the variance would formerly have been fatal (*M'Pherson* v. *Daniels*, 10 B. & C. at p. 274; *Bell* v. *Byrne*, 53 East, 544; *Pearce* v. *Rogers*, 2 F. &. F 137); but now such a variance would be amended, on payment of the costs, if any, thereby occasioned. (*Smith* v. *Knowelden*, 2 M. & Gr. 561; see *post*, pp, 564–5.) If the libel consist of two letters published in successive issues of a newspaper, neither of which is a complete libel without the other, both must be set out *verbatim*. (*Solomon* v. *Lawson*, 8 Q. B. 823; 15 L. J. Q. B. 253; 10 Jur. 796.) But in other cases it is not necessary to set out the whole of an article or review containing libellous passages; it is sufficient to set out the libellous passages only, provided that nothing be omitted which qualifies or alters their sense. If, however, the meaning of the libellous passages taken singly is not clear, or if the rest of the article would in any substantial degree vary the meaning of the words complained of, the whole must be set out. (*Cartwright* v. *Wright*, 5 B. & Ald. 615; *Buckingham* v. *Murray*, 2 C. & P. 47; *Rutherford* v. *Evans*, 6 Bing. 451; 4 C. & P. 74; *Rainy* v. *Bravo*, L. R 4 P. C. 287; 20 W. R. 873.) Where detached portions of a book or article are thus given, it should appear on the statement of claim that they are detached portions (see Precedent, No. 7); they should not be printed as though they ran on continuously. (Per Lord Ellenborough, in *Tabart* [* 530] v. *Tipper*, 1 Camp. 353.) Still, if they are so printed, the variance will not be fatal, unless the defendant can show that the sense is materially altered by their being so printed. (*Re Crowe*, 3 Cox, C. C. 123; *R.* v. *Fussell*, *ib.* 291.)

It must be alleged that the defendant "spoke and published" or "wrote and published" these words. It is essential in cases of libel to add the words "and published," as writing a libel which is never published is no tort. Still it is not absolutely necessary to use the very word "published;" in *Baldwin* v. *Elphinston* (2 W. Bl. 1037) the phrase "printed and cause to be printed" was held sufficient. Further, it must always be alleged that the words were spoken or written "of and concerning the plaintiff." Then it should be averred that the defendant spoke or wrote and published the words "falsely and maliciously." This is a time-honoured phrase which appears in every statement of claim; and it would be foolish to idly raise a point of law by omitting it; though in my opinion its omission would not be a fatal defect. For, by r. 25 of Order XIX., "neither party need in any pleading allege any matter of fact which the law presumes in his favour, or as to which the burden of proof lies upon

the other side, unless the same has first been specifically denied." As long ago as 1652, Rolle, C. J., held these words unnecessary in a declaration. (*Anon.*, Style, 392.) In 1813, Lord Ellenborough held the absence of the word "falsely" immaterial, "unlawfully and maliciously" being present. (*Rowe* v. *Roach*, 1 M. & S. 309.) So, too, under the old practice it was decided that if "falsely" was inserted, "maliciously" might be omitted. (*Mercer* v. *Sparks* (1586), Owen, 51 ; Noy, 35 ; *Anon.* (1596), Moo. 459. See per Brett, L. J., in *Clark* v. *Molyneux*, 3 Q. B. D. 247 ; *ante*, p. 271.) There is, however, a practical convenience in alleging malice in the statement of claim, viz., if the defendant pleads privilege, no special reply is then necessary ; the formal averment in the statement of claim takes a new meaning, and becomes an allegation of express malice.

But the part of the statement of claim which requires most care in drafting is the innuendo. As to its office, see *ante*, pp. 100—117. Where the words are clearly actionable on the face of them, no innuendo is necessary, though even here one is frequently inserted. But whenever the words are actionable only in some secondary sense, or by reason of some surrounding circumstances, an innuendo is essential to the plaintiff's success. So, too, if the plaintiff be not named, an innuendo must be inserted, "meaning thereby the plaintiff," &c. ; and it is well, though not essential, to state facts which make it clear that the plaintiff is the person referred to. (See *ante*, p. 128.)

[*531] Besides the innuendo, the pleader was formerly required to insert a variety of minute averments, which were supposed to increase the "certainty" of the pleading. Thus it was necessary that there should be a *colloquium*, an averment that the defendant was speaking of the plaintiff, as well as constant innuendoes, and other allegations properly connecting these innuendoes with the introductory averments which describe the locality, the relationship between the various persons mentioned, and all the surrounding circumstances necessary to fully elucidate the defendant's meaning. These matters could not be proved at the trial, unless they were set out on the record. (See *ante*, pp. 118—120, 128.) And if some of them were proved at the trial and not others, many legal refinements arose as to how far such allegations were or were not divisible. But now, by s. 61 of the C. L. P. Act, 1852 (*post*, p. 721), the *colloquium* and all other prefatory averments are rendered unnecessary ; and r. 4 of Ord. XIX. requires that "every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies, but not the evidence by which they are to be proved." The only case in which an introductory averment is now essential is where the words are actionable only by reason of being spoken of the plaintiff in the way of his office, profession or trade. Here there must always be an averment that the plaintiff actually held the office or carried on the profession or trade at the time the words were spoken. (*Gallwey* v. *Marshall*, 9 Ex. 300 ; 23 L. J. Ex. 78 ; 2 C. L. R. 399.) And there should also be an averment that the words were spoken of the plaintiff with reference to

such office, profession, or trade. But if the former allegation appear, the omission of the latter is not fatal, as the judge will in a proper case amend the statement of claim by inserting an allegation to that effect. (*Ramsdale* v. *Greenacre*, 1 F. & F. 61.) But it is often desirable in other cases to plead some introductory averment which, though not strictly necessary, will help to make the case clear, by explaining what is to follow. (See Precedents of Pleading, Nos. 4, 5, 8, 11, 12, 13.) Remember, however, that the presence of such introductory averments will not cure the omission of a proper innuendo. (*Simmons* v. *Mitchell*, 6 App. Cas. 156; 50 L. J. P. C. 11; 29 W. R. 401; 43 L. T. 710; 45 J. P. 237.)

Also, where the words were spoken ironically, it must be averred that they were so spoken, or the statement of claim will disclose no cause of action (*ante*, p. 116).

Always aver, wherever there is any ground for doing so, that the words were spoken of the plaintiff in the way of his trade. This allegation won the demurrer for the plaintiff in *Foulger* v. *Newcomb*, L. R. [* 532] 2 Ex. 327; 36 L. J. Ex. 169; 15 W. R. 1181; 16 L. T. 595; and had it been present it would probably have saved *Miller* v. *David*, L. R. 9 C. P. 118; 43 L. J. C. P. 84; 22 W. R. 332; 30 L. T. 58. Yet it does not always avail: see *Sheahan* v. *Ahearne*, Ir. R. 9 C. L. 412.

As to the claim for damages. Where the words are clearly actionable *per se*, it is of course unnecessary to claim *general* damages, though it is sometimes done: but any special damage that may have accrued must in every case be specifically stated, and with sufficient particularity to enable the defendant to know precisely what case he has to meet; otherwise such evidence will be rejected at the trial. (*Black* v. *Lovering*, 1 Times L. R. 497.) If the special damage alleged be loss of custom, the customers' names must be given, unless it is clear from the circumstances that plaintiff would not have known their names. (*Evans* v. *Harries*, 26 L. J. Ex. 32, *ante*, p. 307.) So, if loss of marriage be alleged, the gentleman or lady must be named. (See Precedents, Nos. 5, 10, 14, 15, 16, 17.) If such names and other details of the alleged loss be not given in the pleading, a master at chambers will order particulars to be delivered, or, in default, that the allegations be struck out of the statement of claim. (*Dimsdale* v. *Goodlake* (1876), 40 J. P. 792.) As to what constitutes special damages, see *ante*, pp. 297—309.

An injunction may also be claimed, if there is any reason to apprehend any further publication of the defamatory words; *e. g.*, "An injunction to restrain the defendant from publishing the said pamphlet or any other libels or slanders affecting the plaintiff in his profession and offices," or more briefly: "An injunction to restrain the defendant from similar publications in future." (And see 15 Q. B. D. 650; and Precedents, Nos. 7 and 13.)

Lastly, some place of trial must be named, unless the plaintiff desires that the action be tried in Middlesex. His choice will be determined as a rule by considerations of economy and convenience; he will fix the trial in the place that best suits himself and his wit-

nesses. But if the action be against a newspaper of wide circulation in the district, or if the defendant in any other way is popular or powerful in his own neighborhood, the plaintiff should decide on Middlesex, where he is sure of an impartial jury.

Instructions for Defence.

On receiving the statement of claim, the defendant should carefully consider his position, and decide on his course of action. Often it would be well for him to apologize at once, and pay money into court. In some few cases he should declare war to the knife, and justify. But it is no use for him to send his counsel merely a copy of the statement of claim with instructions consisting solely of the words "Counsel will please draw the necessary pleas." The defence in an action of libel or slander is a most important document, and should not be drafted hurriedly or on insufficient materials. Before settling it, counsel should be put in possession of all the facts. He should be asked to advise whether the occasion was privileged; and if there is any thought of a justification, the evidence by which it is proposed to support that plea should be submitted to counsel in full detail, and his opinion taken as to its sufficiency. If no definite instructions be given to counsel, he will content himself with putting plaintiff to proof of every material allegation in the statement of claim.

Amendment.

The defendant's counsel, on receiving the statement of claim, should first consider if it discloses any cause of action. If the words are not actionable *per se*, and no special damage is alleged, he should take out a summons under Ord. XXV. r. 4, to have the action dismissed as being frivolous and vexatious. So, if the words set out are not defamatory in their ordinary signification, and there is no innuendo, or if the innuendo alleges a meaning which it is clear that the words will not bear. In other cases, *e. g.*, where the words complained of are not set out *verbatim*, a summons should be taken out under Ord. XIX. r. 27. But unless the defect is seriously embarrassing, it is often better policy to leave it unamended; it is no part of the defendant's duty to reform the plaintiff's pleading. But be careful in drawing the defence not to aid the defect in the claim in any way; the less said about that part of the pleading the better; do not admit it; if need be, traverse it in so many words; but after such denial, avoid the whole topic, if possible; leaving plaintiff's counsel to explain it to the judge at the trial, if he can.

Particulars.

But the more usual application at this stage is for particulars. (See Ord. XIX. rr. 7, 8.)

It is now settled practice that the defendant is entitled to particulars of the places where, the times when, and the persons to

whom the alleged slanders or libels were published, if such details are not given [*534] in the statement of claim. (*Roselle* v. *Buchanan*, 16 Q. B. D. 656; 55 L. J. Q. B. 376; 34 W. R. 488; extending the decision in *Bradbury* v. *Cooper*, 12 Q. B. D. 94; 53 L. J. Q. B. 558; 32 W. R. 32; 48 J. P. 198.)

It is no objection that the defendant must know already to whom he spoke and wrote; he is entitled to know the case that is going to be made against him. But, of course, the plaintiff cannot be compelled to give the names of the persons passing in the street at the time the alleged slander was uttered. (*Wingard* v. *Cox*, Weekly Notes, 1876, p. 106; Bitt. 144; 20 Sol. J. 341; 60 L. T. Notes, 304.) Nor can a person libelled in a newspaper be expected to give the names of all who take the paper.

So, too, whenever any special damage is claimed, but not with sufficient detail, particulars will be ordered of the alleged damage, setting out the names of the customers who had ceased to deal with the plaintiff in consequence of defendant's words. This is a very useful order; as, if plaintiff cannot give the names, he will be compelled to strike out the allegation of special damage, and the summons should ask that it be struck out if such particulars be not delivered. (See Precedents of Pleading, Nos. 10, 20.) Particulars of general damage will, of course, never be ordered; as such damage exists rather in contemplation of law than in reality.

Defence.

Formerly, by one short and convenient plea, "Not Guilty," the defendant denied the publication of the defamatory matter, denied its publication in the defamatory sense imputed by the innuendo, or in any defamatory actionable sense which the words themselves imported, asserted that the occasion was privileged, and also denied that the words were spoken of the plaintiff in the way of his profession or trade, whenever they were alleged to have been so spoken. But now this compendious mode of pleading is abolished. "Not Guilty" can no longer be pleaded. The defendant must now deal specifically with every allegation of which he does not admit the truth. It will be necessary, therefore, to consider the following several pleas:—

1. Traverses putting plaintiff to proof of his case.
2. Objections on points of law.
3. Privilege.
4. Justification.
5. Other special defences.

[* 535] 6. Payment into court.

7. Apology.
8. The defendant may also set up a counterclaim.

1. *Traverses.*

It was intended by the framers of the Judicature Act, that each party in his pleading should frankly admit every statement of fact

which he does not intend to seriously dispute at the trial. But this intention has not been carried out. Counsel hesitate to make admissions unless they are expressly instructed to do so, which they very seldom are. No doubt it may sometimes be desirable to deny uttering or writing the words, so as to compel the plaintiff to call as his witness the person to whom the defendant spoke or wrote, whom then the defendant cross-examines to show privilege. But as a rule the defendant should admit the publication whenever it can be proved against him without trouble. Do not deny everything in the Statement of Claim. It looks weak, as though the defendant had no real defence. At the same time, be careful how you admit even the introductory paragraphs, which may appear immaterial; they were not inserted without some purpose. Every allegation of fact not denied specifically shall be taken to be admitted. (Ord. XIX. r. 13.) The following are the most usual traverses :—

1. "The defendant never spoke or published the words set out in paragraph 2 of the Statement of Claim." The words "either falsely or maliciously" must not be added. (*Belt* v. *Lawes*, 51 L. J. Q. B. 359.) For the plea, as it stands without them, is a denial of the publication in fact ; if the plaintiff prove publication, the law will presume it to have been false and malicious, until the defendant proves either privilege or a justification ; and both privilege and justification must be specially pleaded, not merely suggested by the addition of four words to a plea which really raises quite a different defence.

2. "The defendant never spoke or published the words set out in paragraph 2 of the Statement of Claim with the meaning as therein alleged." This is a traverse of the innuendo. The innuendo, if there be one, should always be traversed ; as the plaintiff is sure to have put the blackest construction on the words.

3. "The plaintiff did not, at the date of the publication, if any, of the said words, carry on the business of a butcher as alleged in paragraph 1 of the Statement of Claim" ; or "The plaintiff was not at the date, &c., vicar of ——— as alleged," or "was not then a [* 536] partner in the firm of Mears and Stainbank as alleged." This is a traverse of the special character in which the plaintiff sues ; and must always be specially pleaded. (Rules of Trinity Term, 1853, r. 16 ; R. S. C. Ord. XIX. r. 11.) If the defendant also wishes to raise at the trial the defence that plaintiff's trade is illegal, this also must now be specially pleaded. (*Manning* v. *Clement*, 7 Bing. 362 ; 5 M. & E. 211, is no longer law on this point.)

4. "The defendant denies that he spoke or published the said words, if at all, with reference to the plaintiff in the way of his said business or trade of a butcher [office or profession of ———]." This plea did not require to be pleaded specially under the old system, and it would, therefore, I presume be now deemed to be included in a general denial of the allegations in the paragraph. But it is better to set it out plainly.

5. "The words did not refer to the plaintiff." See R. S. C. App. E. s. 3, No. 2 (Wilson, 5th edit. p. 693). This defence seldom succeeds.

6. No denial or defence is necessary "as to damages claimed or their amount; but they shall be deemed to be put in issue in all cases, unless expressly admitted." (Ord. XXI. r. 4. And see Ord. XIX. r. 17.)

2. *Objections on Points of Law.*

Demurrers are now abolished (Ord. XXV. r. 1). But r. 2 of the same order enacts that:—"Any party shall be entitled to raise by his pleadings any point of law, and any point so raised shall be disposed of by the judge who tries the cause at or after the trial, provided that by consent of the parties, or by order of the court or a judge on the application of either party, the same may be set down for hearing and disposed of at any time before the trial." And r. 3, provides that:—"If, in the opinion of the court or a judge, the decision of such point of law substantially disposes of the whole action, or of any distinct cause of action therein, the court or judge may thereupon dismiss the action or make such other order therein as may be just." Hence it is clearly worth while to raise on the pleadings any point of law which will substantially dispose of the whole action. A specimen is given in the Rules of 1883, Appendix E. s. 3, No. 2 (Wilson, 5th edit. 693):—"The defendant will object that the special damage stated is not sufficient in point of law to sustain this action." Similarly, if no special damage be alleged, the defendant may object "that the said words are not actionable without proof of special damage;" or if they be printed "that the matter [*537] contained in the same paragraph is no libel." This was held a good plea in Ireland before the Judicature Act, on the ground that it raised a question which was now for the jury, not the judge. (*Nixon* v. *Harvey*, 8 Ir. C. L. Rep. 446.) And since then such a plea has been freely used in Ireland. (See *Maguire* v. *Knox*, Ir. R. 5 C. L. 408; *Stannus* v. *Finlay*, Ir. R. 8 C. L. 264; *Cosgrave* v. *Trade Auxiliary Co.*, Ir. R. 8 C. L. 349; *M'Loughlin* v. *Dwyer* (1), Ir. R. 9 C. L. 170.) But if the defendant contends that the words *cannot* possibly be construed into a libel, this is a question for the judge who should then withdraw the case from the jury; and such a contention may rightly be stated as a point of law. If words which are not defamatory are accompanied by an innuendo which purports to give them an actionable meaning, the defendant should first traverse the innuendo and may then proceed to object "that the said words are incapable of the meaning alleged in paragraph 2 of the Statement of Claim, or of any other defamatory meaning. The said words without the alleged meaning are no libel."

3. *Privilege.*

Formerly it was unnecessary specially to plead privilege; this defence was available under the plea of Not Guilty, as it still is in criminal cases. (*Lillie* v. *Price*, 5 A. & E. 645.) But since the Judicature Act privilege must be specially pleaded, and facts and circumstances must also be stated showing why and how the occasion

is privileged. (Ord. XIX. r. 18 ; *Spackman* v. *Gibney*, Ex. D. (not reported) ; *Simmonds* v. *Dunne*, Ir. R. 5 C. L. 358.) Several such pleas will be found collected on pp. 643–652.

It is necessary where the occasion is not absolutely privileged to aver that the defendant acted *bonâ fide* and without malice. (*Smith* v. *Thomas*, 2 Bing. N. C. 372.) Such an allegation is material in cases of absolute privilege. If defendant avers that he had just and reasonable grounds for believing the charges against the plaintiff to be true, he must set forth what were the grounds of such belief. (*Fitzgerald* v. *Campbell*, 18 Ir. Jur. 153 ; 15 L. T. 74. But see *Cave* v. *Torre*, 54 L. T. 515.) It is better, however, to avoid such an averment altogether, and to state that he repeated the charge *bonâ fide* and in the honest belief of its truth. An averment of just and reasonable grounds runs dangerously near to a justification, and the averment of *bonâ fides* covers and includes it.

4. *Justification.*

[* 538] This is a most dangerous plea, and should never be placed on the record without careful consideration of the sufficiency of the evidence by which it is to be supported ; for the strictest proof is required (see *Leyman* v. *Latimer*, 3 Ex. D. 15, 352 ; 47 L. J. Ex. 470 ; 25 W. R. 751 ; 26 W. R. 305 ; 37 L. T. 360, 819) ; and if it be not proved, the defendant's persistence in the charge is some evidence of malice, and will always tend to aggravate the damages given against him. The defence cannot be raised without a special plea ; and counsel should never draw such a plea without express instructions, and even then should always caution the defendant as to the risk he runs.

When the libel consists of one specific charge, *e. g.*, "He forged my name to a bill for £500," it is sufficient to plead generally :—"The said words are true in substance and in fact." So if the charge made by the defendant is :—"He stole his master's sheep," it will be sufficient to allege that "the plaintiff did steal four sheep the property of his master, John Jones." But whenever a general charge is made, the very words alleged to have been uttered must be expressly justified (*per* Quain, J., in *Restell & another* v. *Steward*, Weekly Notes, 1875, p. 249 ; 1 Charley, 89 ; Bitt. 65 ; 20 Sol. J. 140 ; 60 L. T. Notes, 123) ; and also specific instances must be given, either in the plea or in the particulars. (*Newman* v. *Bailey*, 2 Chit. 665 ; *D'Anson* v. *Stuart*, 1 T. R. 748 ; 2 Sm. L. Cas. 6th ed. 57 ; *Holmes* v. *Catesby*, 1 Taunt. 543 ; *Hickinbotham* v. *Leach*, 10 M. & W. 361.) And it is not sufficient to allege and prove one solitary instance, where the words impute constant and habitual misconduct. (*Wakley* v. *Cooke & Healey*, 4 Ex. 511 ; 19 L. J. Ex. 91.) It is enough to cite three instances (*Moore* v. *Terrell and others*, 4 B. & Ad. 870 ; 1 N. & M. 559), and to clearly prove two. (*R. pros. Lambri* v. *Labouchere*, 14 Cox, C. C. 419.) Such instances must be pleaded with sufficient particularity to inform the plaintiff precisely what are the facts to be tried. It should be alleged that they happened "before the publication, if any, of the said words," and then the plea may con-

clude, "wherefore the defendant says that the said words are true in substance and in fact." As a rule these instances should be stated in the body of the plea. (*Honess & others* v. *Stubbs*, 7 C. B. N. S. 555; 29 L. J. C. P. 220; 6 Jur. N. S. 682.) But if they are numerous or complicated, they may be given in particulars instead. (*Behrens* v. *Allen*, 8 Jur. N. S. 118; 3 F. & F. 135; *Jones* v. *Bewicke*, L. R. 5 C. P. 32; *Gourley* v. *Plimsoll*, L. R. 8 C. P. 362; 42 L. J. C. P. 121; 21 W. R. 683; 28 L. T. 598. And now see Ord. XIX. r. 9.)

[*539] If it appears from the words set out in the statement of claim that the defendant did not make a direct charge himself, but only repeated what A. said, then a general plea that the words are true will be insufficient (*Duncan* v. *Thwaites*, 3 B. & C. 556); for it will only amount to an assertion that A. said so; whereas the defendant must go further and prove in addition that what A. said was true. (See *ante*, p. 174.)

The precise charge must be justified; and the whole of the precise charge. (*Goodburne* v. *Bowman & others*, 9 Bing. 532.) Every fact stated must be proved true (*Weaver* v. *Lloyd*, 2 B. & C. 678; *Helsham* v. *Blackwood*, 11 C. B. 111; 20 L. J. C. P. 187; 15 Jur. 861), unless it be absolutely immaterial and trivial, and in no way alters the complexion of the affair. But not every comment on such facts need be justified. Thus, if the defendant states certain facts, and then calls the plaintiff a "scamp" and a "rascal," and such epithets would be deserved if the facts as stated are true, then it is sufficient to plead the truth of the facts; the epithets need not be expressly justified. (*Morrison* v. *Harmer*, 3 Bing. N. C. 767; 4 Scott, 533; 3 Hodges, 108; *Tighe* v. *Cooper*, 7 E. & B. 639; 26 L. J. Q. B. 215; 3 Jur. N. S. 716.) But if the comment introduces an independent fact, or substantially aggravates the main imputation, it must be expressly justified. Thus a libellous heading to a newspaper article must be justified as well as the facts stated in the article. (*Bishop* v. *Latimer*, 4 L. T. 775; *Clement* v. *Lewis & others*, 3 Br. & Bing. 297; 3 B. & Ald. 702; 7 Moore, 200. See *ante*, pp. 170-3.)

But the defendant may in mitigation of damages by a special plea (*Vessey* v. *Pike*, 3 C. & P. 512) justify a part of the libel, provided such part is distinct and severable from the rest. (See *ante*, p. 176.) But the plea must distinctly identify the portion justified. (See Precedent, No. 38.) Also, the defendant may deny that the plaintiff's innuendo puts the true construction on the words and assert that in their natural and ordinary signification they are true. But if the defendant adopts the meaning put upon the words by the innuendo, then he must justify them in that sense, and not in any other. (*White* v. *Tyrrell* (2), 5 Ir. C. L. R. 498.) Where a plaintiff claims damages for a libel contained in a letter set out with innuendoes, a justification in the form—"The statements in the said letter are true," is a justification of the libel itself, but not of it as read with the innuendo. (*Per* Archibald, J., at Nisi Prius, in *Payne* v. *Courthope*, 20 Sol. Journ. 724.) For a plea of justification under the new system will "not be taken to intend a justification of

anything more than it actually professes to justify." But any plea which wears a doubtful aspect, which [*540] may be either a justification, or a mere traverse, or a plea of privilege, will be struck out at chambers as embarrassing. (*Carr* v. *Duckett*, 5 H. & N. 783 ; 29 L. J. Ex. 468 ; *Brembridge* v. *Latimer*, 12 W. R. 878 ; 10 L. T. 816 ; *O'Keefe* v. *Cardinal Cullen*, Ir. R. 7 C. L. 319.)

A defendant will not be allowed to amend his defence and plead a justification at the last moment, *e. g.*, on the day before the trial. (*Kirby* v. *Simpson*, 3 Dowl. 791.)

5. *Other Special Defences.*

Statute of Limitations.—The objection that the action is brought too late must be raised by a special plea (Ord. XIX. r. 15), even though it appear on the face of the Statement of Claim. This was decided as long ago as 1636. (*Hawkings* v. *Billhead*, Cro. Car. 404.)

Previous Action.—That plaintiff has previously sued defendant for the same cause of action is a defence, whatever the result of the former action. (See Precedent, No. 63.) That judgment was recovered against one joint publisher is also a bar to any action against the others for the same publication. (See form of plea, 2 C. & K. 683, n.)

Accord and Satisfaction.—That plaintiff agreed to accept certain apologies and that defendant duly published them in accordance with such agreement was held a bar to the action in *Boosey* v. *Wood*, 3 H. & C. 484 ; 34 L. J. Ex. 65. See also *Lane* v. *Applegate*, 1 Stark. 97 ; and *Marks* v. *Conservative Newspaper Co.*, 3 Times L. R. 244.

As to accord and satisfaction made by one jointly liable with the defendant see *Bainbridge* v. *Lax*, 9 Q. B. 819 ; *Thurman* v. *Wild*, 11 A. & E. 453 ; *Hey* v. *Moorhouse*, 6 Bing. N. C. 52. An accord or satisfaction made by a third party on the defendant's behalf, and accepted by the plaintiff in discharge will be a bar to the action. (*Jones* v. *Broadhurst*, 9 C. B. 173.) See Precedents, Nos. 64, 65.

Release.—A release must be specially pleaded. (Ord. XIX. r. 15.) In an American case (*Beach et ux. Beach*, 2 Hill (N. Y.) 260, *ante*, p. 399), a release by the plaintiff's husband was pleaded to an action for slander of the wife.

Husband and Wife.—By virtue of the Married Women's Property Act Amendment Act, 1874 (37 & 38 Vict. c. 50), s. 2, a husband, when sued for a libel or slander published or uttered by his wife before her marriage may, if married between July 30th, 1874 and January 1st, 1883, in addition to any other pleas, plead that no property vested in him by reason of the marriage within the meaning of s. 5, or if a certain amount of property did so vest in him, then that he is liable [*541] to that extent and no further. As to a husband married on or since January 1st, 1883, see *ante*, pp. 402, 403.

Where a man and woman sue as husband and wife for defamation of the woman, the defendant may plead that they are not husband and wife ; for if so, the male plaintiff has no right of action.

(*Chantler and wife* v. *Lindsey*, 16 M. & W. 82 ; 4 Dowl. & Lowndes, 339.) But now see 45 & 46 Vict. c. 75, s. 1, *ante*, p. 396.

6. *Payment into Court.*

Payment into court is not strictly a defence ; it is rather an attempt at a compromise, practically admitting liability to a certain extent. In all other actions a defendant may pay money into court, while at the same time he denies all liability. But this is not allowed in actions or counter-claims for libel or slander. (Ord. XXII. r. 1.) Here the defendant if he pays money into court at all, must do so "by way of satisfaction which shall be taken to admit the claim or cause of action in respect of which the payment is made." Hence *Jones* v. *Mackie*, L. R. 3 Ex. 1 ; 37 L. J. Ex. 1 ; 16 W. R. 109 ; 17 L. T. 151, and *Hawkesley* v. *Bradshaw*, (C. A.) 5 Q. B. D. 302 ; 49 L. J. Q. B. 333 ; 28 W. R. 557 ; 42 L. T. 285 are no longer law since October 24th, 1883. I should not, therefore, advise a defendant who has any defence on the merits to pay money into court. If he decides to do so, he should pay in a good round sum ; generally *twice* as much as the defendant himself thinks the plaintiff is entitled to, will be about the right amount for him to pay into court. Generally it is not worth while to pay a farthing or a shilling into court ; for it is very improbable that plaintiff will accept that sum, and if the jury do not award more than such contemptuous damages, the judge would probably order the plaintiff to pay his own costs, whether that amount had been paid into court or not.

It is submitted that where the words are defamatory in their natural and obvious meaning and the plaintiff by his innuendo puts on them a more defamatory meaning, the defendant may traverse the innuendo and at the same time pay money into court ; as such a traverse is not in that case "a defence denying liability." (See Precedents, Nos. 66, 68, 69.)

7. *Apology.*

By Lord Campbell's Libel Act (6 & 7 Vict. c. 96), s. 2, in an action for a libel contained in any public newspaper or periodical publication, the defendant may plead that the libel was inserted [* 542] without actual malice and without gross negligence, and that before the commencement of the action, or at the earliest opportunity afterwards, an apology was published or offered, and may pay money into court by way of amends. (For the form of plea, see Precedent, No. 72.) The words in this section enabling the defendant to pay money into court were repealed in 1879 as being unnecessary, the Rules of 1875 permitting payment into court in every action. But the section 2 of the 8 & 9 Vict. c. 75, which requires payment into court as the necessary concomitant of such a plea is not repealed. Money must therefore be paid into court when the pleading is delivered, if not before ; otherwise the plea will be struck out. And such payment will operate as an admission of liability. (Order XXII. r. 1.)

If therefore the proprietor of a newspaper desires to rely on this section, he cannot set up any other defence to the action, though he may of course deliver a notice under Order XXXVI., r. 37.

The above section of Lord Campbell's Act applies only to public periodical publications; but s. 1 of the same act empowers *any* defendant to give in evidence in mitigation of damages in any action, whether of slander or libel, that he made or offered an apology to the plaintiff before action, or at the earliest opportunity afterwards, if he had no opportunity before action. This section distinctly does not empower a defendant to plead an apology; for it requires him *with his plea* to give notice in writing to the plaintiff of his intention to give such apology in evidence. But there can be no objection now to the defendant making such written notice part of his defence; indeed that he made such an apology is a material fact on which he relies, within the meaning of Order XIX. r. 4. It is, I think, now open to a defendant, if he think fit, to state in his pleading facts which are no defence, but which tend to mitigate the damages. It can scarcely be said that such a method of pleading embarrasses the plaintiff, for it gives him notice what will be the defendant's case at the trial. Indeed the decisions in *Scott* v. *Sampson*, 8 Q. B. D. 491; 51 L. J. Q. B. 380; 30 W. R. 541; 46 L. T. 412; 46 J. P. 408; and *Millington* v. *Loring*, 6 Q. B. D. 190; 50 L. J. Q. B. 214; 29 W. R. 207; 43 L. T. 657; 45 J. P. 268, if taken literally, imply that a defendant *must* always plead such facts in his defence. But this is not the practice, and it may be inferred from Order XXXVI. r. 37, that a defendant is not *bound* to set out in his pleading the facts on which he proposes to rely in mitigation of damages.

But it is quite another matter for the defendant in his defence to apologize for the first time, when he had previous opportunities, of which he did not avail himself. Still this is sometimes done when [* 543] money is paid into court; it shows that the defendant has taken his counsel's opinion, and acted on it. (See Precedents, Nos. 34, 67.) It certainly cannot embarrass a plaintiff to have placed upon the record a full retractation of the charge accompanied by an expression of regret; and it should conduce to an amicable settlement. But it is certainly strange pleading; and if the plaintiff wishes to have it struck out, his application will probably be successful; though he can hardly afterwards demand an apology at the trial. In cases within Order XXXVI. r. 37, the defendant should deliver particulars as therein required. (See Precedents, Nos. 67, 68, 69.)

8. *Counterclaim.*

It is not often that there is a counterclaim in an action for libel or slander, and it would clearly be prejudicial to the fair trial of the action to permit a defendant to raise incongruous issues. Still there is no reason why other libels or slanders published by the plaintiff of the defendant should not be made matter of counterclaim, and the fact that they arise out of a different transaction will be no ground for excluding them (*Quin* v. *Hession*, 40 L. T. 70; 4 L. R. (Ir.) 35), if they can be "conveniently disposed of in the pend-

ing action." In *Nicholson* v. *Jackson*, W. N. 1876, p. 38, where an action had been brought by a director of a company for libel, a counterclaim set up by the defendant for damages for loss sustained in respect of shares bought on false representations, was struck out by Lindley, J. So, in *Lee* v. *Colyer*, W. N. 1876, p. 8; Bitt. 80; 1 Charley, 86; 20 Sol. J. 177; 60 L. T. Notes, 157, Quain, J., struck out a counterclaim for not repairing a house, the action being for assault and slander. And where the writ was specially indorsed for two quarters' rent, the defendant was not allowed to set up a counterclaim for libel and slander not connected with the claim for rent. (*Rotheram* v. *Priest*, 49 L. J. C. P. 105; 28 W. R. 277; 41 L. T. 558.) But in *Dobede* v. *Fisher*, at the Cambridge Summer Assizes, 1880, the late Lord Chief Baron had to try an action of slander, in in which there was a counterclaim about a right of shooting over the land occupied by the defendant. (*Times* for July 29th, 1880.)

Reply.

The plaintiff on receiving the Defence should first consider whether any part of it is such as to entitle him to apply at chambers for an order to amend it. But it does not follow that he should so apply in every case in which he is entitled so to do. (See *ante*, 533.) It [*544] is often better policy to leave a flagrantly bad specimen of pleading unamended, and not to kindly strengthen your adversary's position. No party may dictate to the other how he shall plead; he must satisfy the master at chambers or district registrar that the passage to which he objects is either scandalous (that is, both offensive and at the same time irrelevant), or that it tends to prejudice, embarrass, or delay the fair trial of the action. Then, it may be that his own statement of claim may require amendment; such amendment now takes the place of a "new assignment." (Order XXIII. r. 6.) Or the plaintiff may amend by adding a new defendant. (*Edward* v. *Lowther*, 45 L. J. C. P. 417; 24 W. R. 434; 34 L. T. 255.) Next, if the defendant's pleading requires no amendment, particulars may still be demanded. Thus, where the libel imputed that the plaintiffs had infringed defendant's patents, the defendant was ordered to deliver particulars to the plaintiffs, showing in what respects he alleged that the plaintiffs had infringed his patents, and giving references to line and page of his own specifications. (*Wren and another* v. *Weild*, 38 L. J. Q. B. 88.) If no facts be stated in a plea of justification the plaintiff should apply for particulars, unless the charge of itself be specific and precise; see *ante*, p. 538. If the facts stated are insufficient in law to justify the imputation, the plaintiff may apply to have the plea struck out or amended. So, too, particulars may be obtained if a plea of privilege does not state the circumstances which render the occasion privileged, and on obtaining such particulars plaintiff may object, as a matter of law, that they disclose no privilege.

A reply as a rule is a mere joinder of issue in actions of defamation, unless there be a counterclaim. This operates as a denial of every material allegation of fact in the pleading of the other side,

except admissions. (Ord. XIX. r. 18.) To a plea of absolute privilege no other reply is possible. (See *Scott* v. *Stansfield*, L. R. 3 Ex. 220 ; 37 L. J. Ex. 155 ; 16 W. R. 911 ; 18 L. T. 572 ; *Dawkins* v. *Lord Paulet*, L. R. 5 Q. B. 94 ; 39 L. J. Q. B. 53 ; 18 W. R. 336 ; 21 L. T. 584.)

To a plea of qualified privilege a special reply is unnecessary, if malice be alleged in the statement of claim or negatived in the defence ; see *ante*, p. 530. On a plea under s. 2 of Lord Campbell's Act, the plaintiff usually joins issue merely, but he may if he likes admit that the libel appeared in a newspaper, and that money had been paid into court ; but deny that the libel was inserted without actual malice and without gross negligence, and that the sum of money paid into court is sufficient. (*Chadwick* v. *Herapath*, 3 C. B. 885 ; 16 L. J. C. P. 104 ; 4 D. & L. 653 ; *Smith* v. *Harrison*, 1 F. & F. 565.) To a general plea of payment into court some pleaders reply specially that the sum [*545] paid in is insufficient ; but a mere joinder of issue will raise that point with equal effect. To a justification setting out a conviction or to a plea of a previous action, the plaintiff may reply specially *Nul tiel record ;* or if the conviction be erroneously stated in the defence (as in *Alexander* v. *N. E. Ry. Co.*, 34 L. J. Q. B. 152 ; 11 Jur. N. S. 619 ; 13 W. R. 651 ; 6 B. & S. 340,) the plaintiff may set it out correctly in his reply. Or to such a conviction the plaintiff may reply a pardon (*Cuddington* v. *Wilkins*, Hob. 67, 81 ; 2 Hawk. P. C. c. 37, s. 48), or that he had undergone his sentence, which will have the same effect (Precedent No. 39 ; *Leyman* v. *Latimer and others*, 35 Ex. D. 15, 352 ; 46 L. J. Ex. 765 ; 47 L. J. Ex. 470 ; 25 W. R. 71 ; 26 W. R. 305 ; 37 L. T. 360, 819 ; 14 Cox, C. C. 55) ; though I apprehend neither reply would be an answer if the words complained of were that the plaintiff "was convicted of" a crime.

To a plea of the Statute of Limitations, plaintiff may specially reply absence beyond seas under statute of Anne, *ante*, p. 521.

Interrogatories.

Great care is necessary in applying former decisions as to interrogatories to the present practice. Before the Judicature Act special leave was required to administer interrogatories, and the property of any interrogatory proposed to be administered was discussed on the application for leave, which is not the practice now. Then from November 1st, 1875, to October 24th, 1883 either party delivered interrogatories as of right, subject only to this—that if he exhibited interrogatories unreasonably, vexatiously, or at improper length, he might have been ordered to pay the costs of them. Now, again, leave is necessary, which will not be granted except in very exceptional circumstances before the defence is delivered; and £5 at least must be paid into Court for the privilege (Ord. XXXI. rr. 1, 26). Then between November 1st, 1875, and November 18th, 1878, the party interrogated was always allowed to apply at chambers to have objectionable interrogatories struck out ; this now, as a rule, he may not do ; he merely refuses to answer them in his affidavit in answer. (See *post*, p. 550.)

In actions of slander, too, the courts formerly felt a great reluctance in allowing any interrogatories at all to be administered. (*Stern* v. *Sevastopulo*, 14 C. B. N. S. 737 ; 32 L. J. C. P. 268). In fact, there is only one instance reported of such interrogatories being allowed before the Judicature Act, and in that case (*Atkinson* v. *Fosbroke*, L. R. 1 Q. B. 628 ; 35 L. J. Q. B. 182 ; 12 Jur. N. S. 810 ; 14 W. R. [*546] 832 ; 14 L. T. 553) the plaintiff had exhausted every other channel of inquiry, and was unable to discover what were the exact words the defendant had uttered. Formerly, also, the court was reluctant in actions both of libel and slander to assist the defendant in obtaining evidence in support of his plea of justification, on the ground that he ought not to have taken away the character of the plaintiff, unless he was in a position to prove the truth of the charge he made. (*Metropolitan Saloon Omnibus Co.* v. *Hawkins*, 4 H. & N. 87, 146; 28 L. J. Ex. 201 ; 7 W. R. 265 ; 32 L. T. (Old S.) 281 ; 5 Jur. N. S. 226.) But this reluctance has entirely disappeared (see *Marriott* v. *Chamberlain*, (C.A.) 17 Q.B.D. 154 ; 55 L. J. Q. B. 448; 34 W. R. 783 ; 54 L. T. 714), and both defendant and plaintiff now deliver and answer interrogatories as in any other action.

The object of interrogating is twofold ; first, to obtain admissions to facilitate the proof of your own case ; secondly, to ascertain so far as possible the case of your opponent. There is therefore some art required in drawing interrogatories. Think rather of the answer defendant will probably give you than of the answer which you are instructed he ought to give to the question you are putting. The defendant's version of the matter must differ from the plaintiff's version, and your object is to discover precisely where and to what extent they differ. The question then should be framed so as, in the first place, to elicit if possible the admission you desire: and at the same time, failing that answer, to get, at all events, some definite statement sworn to, from which the party interrogated cannot afterwards diverge. Leave him no loophole of escape. If he will not answer the question your way, still at least find out how far he is prepared to go in the opposite direction. To secure this it is well to ask a long series of short questions, not one long question. Each additional detail should be put in a question by itself. But there are certain rules which determine what interrogatories may be administered and what not :

1. Interrogatories must be relevant to the matters in issue. Not every question which could be asked a witness in the box may be put as an interrogatory. (*Per* Martin, B., in *Peppiatt and wife* v. *Smith*, 33 L. J. Ex. 240 ; and see the concluding words of Ord. XXXI. r. 1.) Thus, questions to credit only will not be allowed, although of course, they may be asked the party in cross-examination. (*Baker* v. *Newton*, Weekly Notes, 1876, p. 8 ; 1 Charley, 107; Bitt. 80; 20 Sol. J. 177; 60 L. T. Notes, 157; *Allhusen* v. *Labouchere*, (C.A.) 3 Q. B. D. 654; 47 L. J. Ch. 819; 27 W. R. 12; 39 L. T. 207.) " We have never allowed interrogatories merely as to the credibility of a party as a witness." (*Per* Cockburn, C. J., in *Labouchere* v. *Shaw*, 41 J. P. 788;) [*547] Again, no question need be answered which is not put *bonâ*

fide for the purposes of the present action. Thus, the publisher of a newspaper must answer the interrogatory : " Was not the passage set out in paragraph 3 of the Statement of Claim intended to apply to the plaintiff ? " ; but he need not answer the further question, " If not, say to whom ? " as, if the passage did not apply to the plaintiff, it is immaterial to whom it referred, so far as the plaintiff's action is concerned. (*Wilton* v. *Brignell*, Weekly Notes, 1875, p. 239 ; 1 Charley, 105 ; Bitt. 56 ; 20 Sol. J. 121 ; 60 L. T. Notes, 104.) So defendant cannot be asked, " If you did not print the libel, did M'C. & Co. or some other and what firm print it ? " (*Pankhurst* v. *Wighton & Co.*, 2 Times L. 745.) Interrogatories asking plaintiff whether similar charges had not been made against him previously in a newspaper, and whether he had contradicted them or taken any notice of them on that occasion, are clearly irrelevant. (*Pankhurst* v. *Hamilton*, 2 Times L. R. 682.) So, too, interrogatories were disallowed which asked the plaintiff for particulars of sums already recovered by him in other actions in respect of other publications of the same libel. (*Tucker* v. *Lawson*, 2 Times L. R. 593.)

But interrogatories are not, like pleadings, confined to the facts on which the parties intend to rely ; they should be, and generally are, directed to the evidence by which they intend to establish such facts at the trial. Either party may interrogate as to any link in the chain of evidence necessary to substantiate his case ; the question is relevant as leading up to a matter in issue in the action. Thus, if the defendant denies that he wrote the libel, he may be asked whether other documents produced to him are not in his handwriting, though such other documents have nothing to do with the case but will only be used for comparison with the libel. (*Jones* v. *Richards*, 15 Q. B. D. 439.) So, too, a defendant may interrogate as to any fact material to his case upon the issue on a plea of justification. (*Marriott* v. *Chamberlain*, (C. A.) 17 Q. B. D. 154 ; 55 L. J. Q. B. 448 ; 34 W. R. 783 ; 54 L. T. 714.) So if the occasion be privileged either party may interrogate the other with a view of proving or disproving malice. (*Cooper* v. *Blackmore and others*, 2 Times L. R 746.) It was always permissible to interrogate as to matters of reply. *Davis* v. *Gray* (30 L. T. 418), if rightly reported, is and was bad law.

2. The party interrogating may put his whole case to his opponent if he thinks fit, though it is not always wise to do so ; he may also interrogate in full detail as to matters common to the case of both parties ; but he is not entitled to obtain more than an outline of his oppo [*548] nent's case. You can compel your adversary to disclose the facts on which he intends to rely, but not the evidence by which he proposes to prove those facts. You cannot claim to " see his brief " or ask him to name the witnesses he means to call at the trial. You may not ask in whose presence such and such events occurred ; but you are entitled to know precisely what is the charge made against you, and what is the case you have to meet. (*Eade and another* v. *Jacobs*, (C. A.) 3 Ex. D. 335 ; 47 L. J. Ex. 74 ; 26 W. R. 159 ; 37 L. T. 621 ; *Johns* v. *James*, 13 Ch. D. 370;

Ashley v. *Taylor*, 37 L. T. 522 ; (C. A.) 38 L. T. 44.) And it is no objection that the same information might have been obtained by particulars. In *Gay* v. *Labouchere* (4 Q. B. D. 206 ; 48 L. J. Q. B. 279 ; 27 W. R. 412), Cockburn, C. J., asks, "Why should not the plaintiff have this information by means of interrogatories as well as by particulars?" Indeed, there is nothing to prevent a defendant's applying first for particulars and then interrogating the plaintiff as to those particulars afterwards. But a master at chambers has refused to order a defendant to answer interrogatories as to the details of matters which were mentioned only in a notice under Order XXXVI. r. 37.

3. But even in interrogating as to your own case, the questions asked must not be "fishing;" that is, they must refer to some definite and existing state of circumstances, not be put merely in the hopes of discovering something which may help the party interrogating to make out *some* case. They must be confined to matters which there is good ground for believing to have occurred. Thus, where the libel charged the plaintiff with having used certain blasphemous phrases, interrogatories were disallowed as "fishing," the object of which was to show that if plaintiff had not said what he was charged with saying, still he had said something very much like it. (*Pankhurst* v. *Hamilton*, 2 Times L. R. 682.) "Fishing" interrogatories are especially objectionable when their object is to get at something which may support a plea of justification. (*Gourley* v. *Plimsoll*, L. R. 8 C. P. 362 ; 42 L. J. C. P. 121 ; 21 W. R. 683 ; 28 L. T. 598; *Buchanan* v. *Taylor*, Weekly Notes for 1876, p. 73 ; Bitt. 131 ; 20 Sol. J. 298 ; 60 L. T. Notes, 268.)

4. In the Queen's Bench Division, at all events, interrogatories are not allowed as to the contents of written documents, unless it is admitted that such documents have been lost or destroyed. (*Stein* v. *Tabor*, 31 L. T. 444 ; *Fitzgibbon* v. *Greer*, Ir. R. 9 C. L. 294.) Nor will interrogatories be allowed, the object of which is to contradict a written document. (*Moor* v. *Roberts*, 3 C. B. N. S. 671 ; 26 L. J. C. P. 246.) But you may ask what has become of a particular document, and continue : "If you state that such document is lost or destroyed, [*549] set out the contents of the same to the best of your recollection and belief. If you have a copy make it an exhibit to your answer." (See *Wolverhampton New Waterworks Co.* v. *Hawksford*, 5 C. B. N. S. 703 ; 28 L. J. C. P. 198 ; *Dalrymple* v. *Leslie*, 8 Q. B. D. 5 ; 51 L. J. Q. B. 61 ; 30 W. R. 105 ; 45 L. T. 478.)

5. Questions which tend to criminate may certainly be asked, unless they are either irrelevant or "fishing," though the party interrogated is not bound to answer them (*post*, p. 551). That the interrogatories will tend to criminate others is no objection, if they be put *bonâ fide* for the purposes of the present action. (*M'Corquodale* v. *Bell and another*, W. N. 1877, p. 39 ; Bitt. 111 ; 20 Sol. J. 260 ; 60 L. T. Notes, 232.) That to answer them would expose the party interrogated, or third persons, to civil actions, was never an objection. (*Tetley* v. *Easton*, 25 L. J. C. P. 293.)

Setting aside Interrogatories.

Interrogatories cannot now be set aside, unless they are, as a whole, "exhibited unreasonably or vexatiously," or unless any one or more of them is or are "scandalous." (Ord. XXXI. r. 7; *Gay* v. *Labouchere*, 4 Q. B. D. 206; 48 L. J. Q. B. 279; 27 W. R. 413.) Any objection to particular interrogatories, or portions of interrogatories, on the ground that they are irrelevant, or "fishing," &c., &c., must be taken in the affidavit in answer, and is no ground for an application to set the interrogatories aside. And both the phrases "unreasonable or vexatious" and "scandalous" have special meanings. Masters at chambers, following the *dictum* of Pollock, B., *Gay* v. *Labouchere* (4 Q. B. D. 207), construe "unreasonable or vexatious" as referring to the time or stage in the cause at which they are exhibited; in short, that they are "premature." (See *Mercier* v. *Cotton*, 1 Q. B. D. 442; 46 L. J. Q. B. 184; 24 W. R. 566; 35 L. T. 79.) A "scandalous" interrogatory may be defined as an insulting or degrading question, which is irrelevant or impertinent to the matters in issue. "Certainly nothing can be scandalous which is relevant." (*Per* Cotton, L.J., in *Fisher* v. *Owen*, 8 Ch. D. 653.) Questions which tend to criminate are not scandalous, unless they are either irrelevant or "fishing" (*Allhusen* v. *Labouchere*, 3 Q. B. D. 654; 47 L. J. Ch. 819; 27 W. R. 12; 39 L. T. 207), and will not, therefore, be struck out or set aside; the party interrogated must take the objection on oath in his answer. The only case to the contrary since the Judicature Act came into operation (*Atherley* v. *Harvey*, 2 Q. B. D. 524; 46 L. J. Q. B. 518; 25 W. R. 727; 36 L. T. 551) was decided under a mis [* 550] apprehension of the previous practice in Equity, as has been frequently pointed out by learned judges, and is admittedly bad law. (See the remarks of Cotton, L. J., at 8 Ch. D. p. 654.)

And even where the party might have applied to have the interrogatory struck out, he may still take the same objection in his answer. (*Fisher* v. *Owen*, 8 Ch. D. 645; 47 L. J. Ch. 477, 681; 26 W. R. 417, 581; 38 L. T. 252, 577.) He waives nothing by not applying; hence applications to strike out particular interrogatories are now rarely made.

Answers to Interrogatories.

The answers must be carefully drawn. It is quite admissible to answer "Yes" or "No" simply, so long as it is clear how much is thus admitted or denied. So, too, it is quite admissible to say, "I do not know," where the matter is clearly not within the deponent's own knowledge or that of his servants. He is not bound to procure information from others for the purpose of answering. (*Per* Brett, J., in *Phillips* v. *Routh*, L. R. 7 C. P. 287; *Field* v. *Bennett*, 2 Times L. R. 91, 122.) The party interrogated may answer guardedly, and make qualified admissions only, so long as both the admission and the qualification are clear and definite. (*Malone* v. *Fitzgerald*, 18 L. R. Ir. 187.)

Objections under Ord. XXXI. r. 6 are usually taken in the following form. It is safer in every case to expressly take such objections in the answer, though it is not always essential so to do. (*Church* v. *Perry*, 36 L. T. 513; *Smith* v. *Bery*, 25 W. R. 606; 36 L. T. 471.)

1. "I object to answer the 9th and 10th interrogatories on the ground that they are irrelevant and are not put *bonâ fide*, for the purposes of this action."

2. "I object to state the evidence by which I intend to establish the facts set out in paragraphs 4, 5, 6 of my Defence." "I object to name my witnesses." (But see *Marriott* v. *Chamberlain*, (C. A.) 17 Q. B. D. 154; 55 L. J. Q. B. 448; 34 W. R. 783; 54 L. T. 714.)

3. "I object to answer the 5th interrogatory on the ground that it is a *fishing* interrogatory, put for the purpose of making out some case under the defendant's plea of justification."

4. "I object to state the contents of a written document;" or "The said document when produced will be the best evidence of its own contents." The following answer was held sufficient in *Dalrymple* v. *Leslie* (8 Q. B. D. 5; 51 L. J. Q. B. 61; 30 W. R. 105; 45 L. T. 478): "I keep no copy and have no copy of the said letter, and I am unable to recollect with exactness what the statements contained therein were."

[* 551] 5. If the person interrogated be a solicitor, it is a sufficient answer to state "I have no personal knowledge of the matters referred to in this interrogatory, and the only information and belief that I have received or have respecting any such matters has been derived from and is founded on information of a confidential character procured by me as a solicitor of the said C., and not otherwise, for the purpose of litigation between the plaintiff and the said C., either pending or threatened by the plaintiff. I claim to be privileged from answering this interrogatory further." (*Proctor* v. *Smiles*, 55 L. J. Q. B. 467, 527.) Similarly, a client may refuse to disclose information which he only obtained from his solicitor since action and which was the result of inquiries instituted by the solicitor for the purpose of the litigation. (*Proctor* v. *Raiks and another*, 3 Times L. R. 229.)

6. "In answer to the 5th interrogatory, I say that to answer the said interrogatory would tend to criminate me; wherefore I respectfully decline to answer the same;" or, "wherefore I humbly submit that I am not bound to make any further or other answer to the same." This objection must be stated in clear and unequivocal language. (See *Bedford* v. *Colt* (not reported), *post*, p. 660.) In *Lamb* v. *Munster* (10 Q. B. D. 110; 52 L. J. Q. B. 46; 31 W. R. 117; 47 L. T. 442), it was held sufficient for the defendant to state on oath, "I decline to answer all the interrogatories upon the ground that my answer to them *might* tend to criminate me." (And see *Jones* v. *Richards*, 15 Q. B. D. 439.)

To publish a libel is a crime. Hence to ask whether the defendant had any share in writing, printing or composing the alleged libel, or was the editor of the newspaper at the date of publication,

has a direct tendency to criminate him ; and he may therefore refuse to answer such questions, although there is not the faintest prospect in reality of any criminal proceedings being taken against him. And this answer (except in one case) is conclusive ; it is idle for the party interrogating to argue that he does not see how the question can possibly criminate the deponent, if the deponent swears positively it will.

But by statute an exception has been created. Section 19 of the 6 & 7 Will. IV. c. 76 was re-enacted by the 32 & 33 Vict. c. 24, sched. 2, while other sections were repealed by sched. 1. It therefore remains in force, although subsequently the whole original act was repealed by the 33 & 34 Vict. c. 99. It runs as follows : "If any person shall file any bill in any court for the discovery of the name of any person concerned as printer, publisher, or proprietor of any newspaper, or of any matters relative to the printing or publishing [* 552] of any newspaper, in order the more effectually to bring or carry on any suit or action for damages alleged to have been sustained by reason of any slanderous or libellous matter contained in any such newspaper respecting such person, it shall not be lawful for the defendant to plead or demur to such bill, but such defendant shall be compellable to make the discovery required ; provided always, that such discovery shall not be made use of as evidence or otherwise in any way proceeding against the defendant, save only in that proceeding for which the discovery is made." Before the Judicature Act it was held that this section was confined to a bill for discovery in Equity, and was not incorporated by the C. L. P. Act, 1854, so as to apply to interrogatories at Common Law. It followed that if the defendant answered such interrogatories, his answers could have been used against him in a criminal proceeding. The court therefore refused to order the defendant to give the required information, he having objected on oath to answer the interrogatories, and this although by going into Equity the plaintiff could have compelled the defendant to answer. (*Bowden* v. *Allen*, 39 L. J. C. P. 217 ; 18 W. R. 695 ; 22 L. T. 342.)

Hence a plaintiff was compelled to file a bill for discovery in Equity to obtain this information, a cumbrous and expensive proceeding. There is only one instance reported in which a plaintiff availed himself of the privilege. (*Dixon* v. *Enoch*, L. R. 13 Eq. 394 ; 41 L. J. Ch. 231 ; 20 W. R. 359 ; 26 L. T. 127.) But directly the Judicature Act came into operation, every Division of the High Court of Justice was empowered to grant all equitable remedies, and to exercise all powers formerly possessed by the Court of Chancery, with the especial object of avoiding all circuity and multiplicity of legal proceedings. Hence, as early as November 7th, 1875, Lush, J., in *Ramsden* v. *Brearley* (33 L. T. 322 ; Weekly Notes, 1875, p. 199 ; 1 Charley, 96 ; Bitt. Addenda ; 20 Sol. J. 30), decided that the following interrogatory was allowable, and could not be struck out :—"Were you, on the 22nd of November, 1874, the printer or publisher, or both, of the *Standard* newspaper?" And his lordship decided that the protection accorded by the concluding proviso of sect. 19 of 6 & 7 Will. IV. c. 76, would attach to

the defendant's answers, so that they could not be used against him in any other proceeding. To answer such an interrogatory can not therefore tend to criminate the defendant. This decision was followed by Archibald, J., in *Carter* v. *Leeds Daily News Co. and Jackson*, Weekly Notes, 1876, p. 11 ; 1 Charley, 101 ; Bitt. 91 ; 20 Sol. J. 218 ; 60 L. T. Notes, 196, *post*, p. 659, Precedent, No. 74.

[*553] So, too, in *Lefroy* v. *Burnside* (4 L. R. Ir. 340 ; 41 L. T. 199 ; 14 Cox, C. C. 260), the defendant in an action for libel, the alleged proprietor of a newspaper, was served with interrogatories by the plaintiff inquiring, *inter alia*, whether he was not such proprietor. This interrogatory the defendant in his answer declined to answer, on the ground that it might tend to criminate him in certain criminal proceedings which had been commenced against him by the same plaintiff, and were then actually pending. On summons by the plaintiff to compel further answer to this interrogatory, the Exchequer Division in Ireland held that it must be answered ; inasmuch as sect. 19 of the 6 & 7 Will. IV. c. 76, was still in force, and was by sect. 24, sub-s. 7, of the Judicature Act, 1873, made enforceable by interrogatories in an action in the Queen's Bench Division. (See *post*, p. 659.)

But it must be remembered that sect. 19 of 6 & 7 Will. IV. c. 76, applies only to the "printer, publisher, or proprietor" of a newspaper. A defendant may therefore object, on the ground of criminality, to answer any interrogatory asking whether he is the editor of the paper (*Carter* v. *Leeds Daily News and Jackson*, *supra*), or whether he is the author of the alleged libel. (*Wilton* v. *Brignell*, Weekly Notes, 1875, p. 239 ; 1 Charley, 105 ; Bitt. 56 ; 20 Sol. J. 121 ; 60 L. T. Notes, 104. And see *M'Loughlin* v. *Dwyer* (1), Ir. R. 9 C. L. 170.)

This point is still one of practical importance ; for though the Newspaper Libel and Registration Act, 1881, compels the printer of every newspaper to make an annual return (*ante*, p. 388), still it is possible that since the last return the defendant may have transferred all his interest in the paper to some one else before the libel appeared ; and this it is open to him to prove at the trial, and if proved it will be a good defence. It is not therefore safe to wholly rely on a certificate under that act where the defendant denies on the pleadings that he was proprietor of the paper at the date of the libel.

Where the plaintiff, who had sued the publisher of a newspaper, administered interrogatories and thereby ascertained, for the first time after issue joined, the name of the proprietor of the paper, he was allowed to join the latter as a co-defendant with the publisher under Order XVI. r. 4. (*Edward* v. *Lowther*, 45 L. J. C. P. 417 ; 24 W. R. 434 ; 34 L. T. 255.)

Discovery of Documents.

As a rule, neither party can obtain discovery or inspection of documents before the defence has been delivered. (*British and Foreign Contract Co.* v. *Wright*, 32 W. R. 413.) The Courts of Common [*554] Law used formerly, when discovery was only

granted as a favour, to refuse to assist a defendant to obtain evidence in support of a plea of justification, on the ground that he should not have published the charge till he was in a position to prove its truth. Thus, where a shareholder in a joint stock company published and justified a libel imputing insolvency to the company, he was held to be not entitled to inspect the books of the company. (*Metropolitan Saloon Omnibus Co.* v. *Hawkins*, 4 H. & N. 87, 146; 28 L. J. Ex. 201; 5 Jur. N. S. 226; 7 W. R. 265; 32 L. T. (Old S.) 281.) But in equity it appears that a defendant, in an action of libel, was allowed precisely the same discovery as a defendant in any other suit, and that although he had pleaded a justification. (*Per* Sir John Leach, V.-C., in *Thorpe* v. *Macaulay*, 5 Madd. 230; and see Hare on Discovery, p. 116.) And now the Chancery rules govern discovery in all Divisions. (*Anderson* v. *Bank of British Columbia*, (C. A.) 2 Ch. D. 644; 45 L. J. Ch. 449; 24 W. R. 724; 35 L. T. 76.) But it may still be questioned whether such discovery should be allowed till after full particulars of such justification have been delivered. A plaintiff was always allowed discovery and inspection of all documents in the possession of the defendant which would help him to rebut the justification. (*Collins* v. *Yates and another*, 27 L. J. Ex. 150.)

In a proper case (as when the chief question in dispute is, In whose handwriting is the libel?), the master will order the party in possession of the libel to permit his opponent to take photographic or facsimile copies thereof, of course at his own expense. (*Davey* v. *Pemberton*, 11 C. B. N. S. 628.)

That letters are privileged in the special sense in which that term is used in actions of defamation (*i.e.*, that the occasion on which they were written renders them not actionable unless the plaintiff can prove malice) is no ground for refusing to produce them: they are not privileged from inspection. (*Webb* v. *East*, (C. A.) 5 Ex. D. 23, 108; 49 L. J. Ex. 250; 28 W. R. 229, 336; 41 L. T. 715.) It is, however, a ground of privilege that the documents, if produced, would tend to criminate the party producing them. But this objection (as in the case of interrogatories) can only be taken by the party himself and on oath. Thus, in an action to recover damages for a libel, alleged by the plaintiff to be contained in two letters which the defendant admitted he had written, the court ordered the defendant to produce copies of these letters in his possession for the plaintiff's inspection, although the defendant raised the objection that such inspection might expose him to criminal proceedings for libel. And this order was affirmed in the Court of Appeal, where it was held [*555] that if the defendant could protect himself from production at all, it could only be by his oath that the production would expose him to criminal proceedings. (*Webb* v. *East*, *supra*.) This decision overrules *Hill* v. *Campbell* (L. R. 10 C. P. 222; 44 L. J. C. P. 97; 23 W. R. 336; 32 L. T. 59), a case which was indeed already practically overruled by *Fisher* v. *Owen*, (C. A.) 8 Ch. D. 645; 47 L. J. Ch. 681; 26 W. R. 581; 38 L. T. 252, 577. Where the defendant was in possession of certain documents, but objected to produce them, because, as he said in his affidavit, "the production

may, to the best of my information and belief, tend to criminate me," the court ordered their production. (*Roe* v. *New York Press and another*, 75 Law Times (newspaper), 31.)

A solicitor who is a party to an action may refuse to produce documents of which he is in possession solely as solicitor for a client. (*Proctor* v. *Smiles*, 2 Times L. R. 474.)

Sometimes, also, production is refused on the ground of public policy and convenience. This can only be where one party to the suit is officially in possession of State documents of importance. If the defendant be a subordinate officer of a public department sued in his official capacity, he cannot claim privilege on the ground of public policy; production can only be refused on that ground by the head of a department. (*Beatson* v. *Skene*, 5 H. & N. 838; 29 L. J. Ex. 430; 6 Jur. N. S. 780; 2 L. T. 378, *post*, p. 563.) But if it be shown to the court that the mind of some responsible person has been brought to bear upon the question, the objection will be upheld. (*Kain* v. *Farrer*, 37 L. T. 469; W. N. 1877, p. 266.)

Advice on Evidence.

As soon as notice of trial is given, or in urgent cases even sooner, the papers should be laid before counsel for his advice on evidence. This should always be done by both sides, even in cases apparently simple; else the action may be lost for want of some certificate or other formal piece of proof, as in *Collins* v. *Carnegie*, 1 A. & E. 695. Every document in the case should be sent in to counsel, especially the affidavits of documents, the answers to interrogatories, and the draft notices to produce and to inspect and admit. Also some statement as to the oral evidence proposed to be given, if not the full proofs which will afterwards form part of the brief.

Counsel in advising on evidence must consider, first, what are the issues in the case, and which lie on the plaintiff, which on the defendant; and then state *seriatim* how each is to be proved or rebutted.

The *onus* lies on the plaintiff to prove that the defendant published [*556] or uttered the defamatory words, that they were understood in the sense alleged in the innuendo, that they referred to the plaintiff, and, if the occasion be one of qualified privilege, that they were published or uttered maliciously. In some cases also it is essential, in every case desirable, to prove special damage resulting from the words. It may further be necessary to prove that the plaintiff at the date of publication held some office or exercised some profession or trade, and that the words were spoken of him in the way of such office, profession, or trade. If money has been paid into court, the *onus* lies on the plaintiff of proving that the amount is insufficient. If the Statute of Limitations has been pleaded, the *onus* lies on the plaintiff (*Wilby* v. *Henman*, 2 Cr. & M. 658) of proving a publication of the libel within six years before action, or the utterance by the defendant of words actionable *per se* within two years, or that damage has within six years resulted from the utterance by the defendant of a slander not actionable *per se*. (See *ante*, p. 520.)

On the defendant, on the other hand, lies the *onus*, of proving privilege, justification, or an accord and satisfaction. If he has pleaded a plea under Lord Campbell's Act, the *onus* lies on the defendant to prove that the libel was inserted without gross negligence, and that a full apology was inserted in proper type before action brought, or as soon as possible afterwards.

The plaintiff may also offer evidence in aggravation, the defendant in mitigation, of damages. (See *ante*, pp. 309, 312.) And defendant's counsel must consider the advisability of giving a notice under Order XXXVI. r. 37, *post*, p. 577. For the form of such a notice, see Precedent No. 68, *post*, p. 656.

Each party should be prepared with evidence not only to prove the issues which lie upon him, but also to rebut his adversary's case. It may be necessary to postpone the trial in order to secure the attendance of witnesses who are ill or absent abroad. (*Turner* v. *Meryweather*, 7 C. B. 251 ; 18 L. J. C. P. 155 ; *Brown* v. *Murray*, 4 D. & R. 830 ; *M'Cauley* v. *Thorpe*, 1 Chit. 685 ; 5 Madd. 19.) In other cases it may be necessary to apply for a commission abroad, or for the examination before trial of a witness who is dangerously ill or about to leave the country. (Order XXXVII. r. 5 ; *Procter* v. *Tyler*, 3 Times L. R. 282.) It is generally necessary to state on affidavit the general nature of the evidence which such witness is expected to give. (*Barry* v. *Barclay*, 15 C. B. N. S. 849.)

Counsel should not consider what documents will be required, and how, if the originals cannot be produced, they may be proved by secondary evidence. (See *post*, p. 563.) For this purpose he must carefully go through the notice to inspect and admit, and the notice [*567] to produce, and advise on their sufficiency. He is sometimes also consulted as to the advisability of securing a special jury (Order XXXVI. r. 7 ; *Roberts* v. *Brown*, 6 C. & P. 757), or of applying to change the venue.

It is often convenient to copy the advice on evidence into the leader's brief, especially if any points of law are discussed in it, and cases cited.

Change of Venue.

The plaintiff has *primâ facie* the right to fix the place of trial ; the defendant must therefore show a distinct preponderance of convenience to oust the plaintiff of his right. Where the defendant resides is quite immaterial. (*Per* Quain, J., 1 Charley, 119 ; Bitt. 53 ; 60 L. T. Notes, 103.) Where the cause of action arose has now but little to do with the question. The defendant must prove that a trial in the place which he prefers will be less expensive and more convenient for the majority of witnesses on both sides. That it will be more convenient for defendant's witnesses is alone no ground for the application. (*Wheatcroft* v. *Mousley*, 11 C. B. 677.) But the defendant will be entitled to have the venue changed if he can show that there is no probability of a fair trial in the place the plaintiff has selected, *e. g.*, if a local newspaper of extensive circulation has published unfair attacks on the defendant with reference to the sub-

ject-matter of the action. (*Pybus* v. *Scudamore*, Arn. 464; *Walker* v. *Broyden*, 17 C. B. N. S. 571.)

Trial.

In actions of slander or libel, the plaintiff usually states in his notice of trial that he desires to have the issues of fact tried by a judge with a jury. (Ord. XXXVI. r. 2.) If he does not, the defendant may signify his wish for a jury by giving notice within four days of the time of the service on him of the notice of trial, or within such extended time as a master may allow, or in his notice of trial, if he give one under rule 12 of the same Order. "And thereupon the same trial shall be so tried." It is always best to have a jury in these actions, and, as a rule, both parties wish for one. (See *ante*, p. 362.)

The plaintiff is always entitled to begin, even where the *onus* of proof lies on the defendant. (*Carter* v. *Jones*, 6 C. & P. 64; 1 M. & R. 281; *Mercer* v. *Whall*, 5 Q. B. 447, 462, 463; 14 L. J. Q. B. 267, 272.)

[*558] *Proof of the Plaintiff's special Character.*

Where the words are actionable only by reason of the plaintiff's holding an office or exercising a profession or trade, the plaintiff must prove that he held such office or exercised such profession or trade at the date of publication, and that the words complained of were spoken of him in that capacity. Sometimes the words themselves admit the plaintiff's special character, or it may be admitted on the pleadings; if so, it is, of course, unnecessary to give any evidence on the point. (*Yrisarri* v. *Clement*, 3 Bing. 432; 4 L. J. (Old S.) C. P. 128; 11 Moore, 308; 2 C. & P. 223.)

Strict proof of the plaintiff's special character is not, as a rule, required. Thus, to prove that a person holds a public office, it is not necessary to produce his written or sealed appointment thereto. (*Berryman* v. *Wise*, 4 T. R. 366; *Cannell* v. *Curtis*, 2 Bing. N. C. 228; 2 Scott, 379.) It is sufficient to show that he acted in that office, and it will be presumed that he acted legally. So, where the libel imputes to the plaintiff misconduct in his practice as a physician, surgeon, or solicitor, and does not call in question or deny his qualification to practise, he need only prove that he was acting in the particular professional capacity imputed to him at the time of the publication of the libel. (*Smith* v. *Taylor*, 1 B. & P. N. R. 196, 204; *Rutherford* v. *Evans*, 6 Bing. 451; 8 L. J. (Old S.) C. P. 86.) It is, as a rule, sufficient to call the plaintiff to say, "I am an M. R. C. S.," or "I am a barrister." But when the libel or slander imputes to a medical or legal practitioner that he is not properly qualified, and the professional qualification is again denied on the pleadings, the plaintiff should always be prepared to prove it, by producing his diploma or certificate, duly sealed or signed, and stamped, where a stamp is requisite. At Common Law there was no other way. (*Moises* v. *Thornton*, 8 T. R. 303; *Collins* v. *Carnegie*, 1 A. & E.

695 ; 3 N. & M. 703 ; *Sparling* v. *Haddon*, 9 Bing. 11 ; 2 Moo. & Scott, 14.)

But now the "Law List" is by the 23 & 24 Vict. c. 127, s. 22, made *primâ facie* evidence that any one whose name appears therein as a solicitor is a solicitor duly certificated for the current year ; and similarly, by the 21 & 22 Vict. c. 90, s. 27, the "Medical Register" is *primâ facie* evidence that the persons specified therein are duly registered medical practitioners. But if it is known the plaintiff's qualification will be seriously challenged at the trial, it is safer not to rely solely on such *primâ facie* proof, but to produce all diplomas and certificates. If the plaintiff sues as a solicitor, and his name does not appear in the "Law List," that may be only because he has not [*559] taken out his certificate for the present year ; in which case he may still sue for a libel on him as solicitor. (*Jones* v. *Stevens* (1822), 11 Price, 235.) So, too, a medical man can sue for a libel on him professionally, although his name does not appear in the "Medical Register," if he can show by a certificate under the hand of the registrar, or in any other way, that he is duly qualified and entitled to be registered.

Proof of Publication.

The plaintiff must next prove that the defendant published the libel or spoke the slanderous words to some third person. As to what is a sufficient publication in law, see *ante*, c. VI. pp. 151—169. As to constructive publication by a servant or agent, see *ante*, pp. 411—413. As to publication by telegram, see *Williamson* v. *Freer*, L. R. 9 C. P. 393 ; 43 L. J. C. P. 161 ; 22 W. R. 878 ; 30 L. T. 332 ; by postcard, *Robinson* v. *Jones*, 4 L. R. Ir. 391. The sale of each copy is a distinct publication. (*R.* v. *Richard Carlile*, 1 Chitty, 451 ; *Duke of Brunswick* v. *Harmer*, 14 Q. B. 185 ; *R.* v. *Stanger*, L. R. 6 Q. B. 352 ; 40 L. J. Q. B. 96 ; 19 W. R. 640.) Causing a libel to be printed may be a *primâ facie* publication. (*Baldwin* v. *Elphinston*, 2 W. Bl. 1037.) But if the libel never reaches the hands of any one except the printers and compositors, this would perhaps in the present day be deemed insufficient. (*Watts* v. *Fraser*, 7 A. & E. 223 ; *Lawless* v. *Anglo-Egyptian Cotton and Oil Co.*, L. R. 4. Q. B. 262 ; 10 B. & S. 226 ; 38 L. J. Q. B. 129 ; 17 W. R. 498.)

If the defendant write a libel, which is in some way subsequently published, this is, *primâ facie* at all events, a publication by the defendant. (*Per* Holt, C. J., in *R.* v. *Beere*, 12 Mod. 221 ; 1 Ld. Raym. 414.) A letter is published as soon as it is posted, provided it ever reaches the party to whom it is addressed, and this will be presumed if there be no evidence to the contrary. Thus, if a letter in the handwriting of the defendant be produced in court with the seal broken, and the proper postmarks outside, that is sufficient evidence of publication. (*Warren* v. *Warren*, 1 C. M. & R. 250 ; 4 Tyr. 850 ; *Ward* v. *Smith*, 6 Bing. 749 ; 4 M. & P. 595 ; 4 C. & P. 302 ; *Shipley* v. *Todhunter*, 7 C. & P. 680.) So, where a libel has appeared in print, and the manuscript from which it was printed

is proved to be in the defendant's handwriting, this is *primâ facie* a publication by the defendant. It is not necessary to prove expressly that he directed or authorized the printing. (*Per* Lord Erskine in *Burdett* v. *Abbot*, 5 Dow, H. L. at p. 201; *Bond* v. *Douglas*, 7 C. & P. 626; *Turpley* v. [*560] *Blabey*, 2 Bing. N. C. 437; 7 C. & P. 395; *R.* v. *Lovett*, 9 C. & P. 462; *Adams* v. *Kelly*, Ry. & M. 157.)

Any one who has ever seen the defendant write (even though once only, *Garrels* v. *Alexander*, 4 Esp. 37), can be called to prove his handwriting. So can any one who has corresponded with the defendant, or seen letters which have arrived in answer to letters addressed to the defendant. Thus, a clerk in a merchant's office who has corresponded with the defendant on his master's behalf, may be called to prove the handwriting. (*R.* v. *Slaney*, 5 C. & P. 213.) The usual course is for the plaintiff's counsel merely to ask the witness, "Are you acquainted with the defendant's handwriting?" leaving it to the defendant's counsel to cross-examine as to the extent of his acquaintance. Such cross-examination will only weaken the force of his evidence, not destroy its admissibility. (*Eagleton* v. *Kingston*, 8 Ves. 473; *Doe* d. *Mudd* v. *Suckermore*, 5 A. & E. 730.) By sect. 27 of the C. L. P. Act, 1854, "comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine, shall be permitted to be made by the witnesses; and such writings, and the evidence of witnesses respecting the same, may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute." (See *Jones* v. *Richards*, 15 Q. B. D. 439.) But the evidence of experts must always be received with caution. In a recent case an expert in handwriting swore positively that the libel was in the handwriting of the Lord Mayor elect; but subsequently a young man came forward and acknowledged that he wrote it, and that Sir F. Truscott never had anything to do with the matter. (See also *Seaman* v. *Netherclift*, 1 C. P. D. 540; 45 L. J. C. P. 798; 24 W. R. 884; 34 L. T. 878; (C. A.) 2 C. P. D. 53; 46 L. J. C. P. 128; 25 W. R. 159; 35 L. T. 784.) If the defendant be present in court, he may, it seems, be then and there required to write something which the court and jury may compare with the document in dispute. (*Doe* d. *Devine* v. *Wilson*, 10 Moo. P. C. at p. 530.) So, too, letters not otherwise evidence in the case, written by the defendant, and in which the plaintiff's name was spelt in a peculiar manner, were held admissible as evidence that the libel which contained the plaintiff's name spelt with the same peculiarity was written by the defendant. (*Brookes* v. *Tichborne*, 5 Ex. 929; 20 L. J. Ex. 69; 14 Jur. 1122.)

The Newspaper Libel and Registration Act, 1881, was passed to facilitate proof of publication of a libel contained in a newspaper. It established a "register of newspaper proprietors" to be kept at Somerset House, and to be open to the inspection of the public. (*Ante*, pp. 388—391.) Every printer and publisher of a newspaper [*561] is bound to make a return each July, giving the names and addresses of all the proprietors of the paper. And a certified copy of any entry in this register is made "sufficient *primâ facie* evidence

of all matters and things thereby appearing" (sect. 15, *ante*, pp. 391, 392), that is, that the person named therein is the proprietor of the newspaper, and, as such, liable for any libel that has appeared therein.

It is still, however, open to the defendant, though registered as the proprietor of the paper, to prove at the trial that since the last return, and before the publication of the libel, he transferred all his interest in the paper to some one else. Section 11, which deals with transfers, *permits*, but unfortunately does not *require*, registration in the event of a change in the proprietorship of a newspaper. The transferee may register his name and address or not as he pleases. (*Ante*, p. 389.) Hence, a plaintiff or prosecutor can never be certain that the registered proprietor is the person liable for the publication complained of. In a civil case this difficulty may be overcome by administering interrogatories. (See *ante*, pp. 551—553.) Or, if no satisfactory admission be thus obtained, the plaintiff must prove that the newspaper "was purchased of the defendant, or at any house, shop, or office belonging to or occupied by the defendant, or by his servants or workmen, or where he may usually carry on the business of printing or publishing such newspaper, or where the same may be usually sold." (6 & 7 Will. IV. c. 76, s. 8.) But it would have been better if the legislature had made the "return according to Schedule B." compulsory on every transfer, and had further enacted that, till such return was registered, the former proprietor should remain liable for everything published in the newspaper.

The statute 6 & 7 Will. IV. c. 76, ss. 6, 8, 13, formerly facilitated proof of publication of a libel contained in a newspaper (*Mayne* v. *Fletcher*, 9 B. & C. 382; *R.* v. *Amphlit*, 4 B. & C. 35); but these sections are now repealed by the 32 & 33 Vict. c. 24, s. 1, sched. 1. It was decided under that act that if the title of the newspaper in which the libel appeared be identical with that in the certificate, this will be sufficient proof of the identity of the newspaper, although the "place of business" named in the certificate be not identical with that named as the address of the printer at the end of the newspaper (*Baker* v. *Wilkinson*, Car. & Marshman, 399.)

Publication may also be proved by the evidence of an accomplice (*R.* v. *Haswell and Bate*, 1 Dougl. 387; *R.* v. *Steward*, 2 B. & Ad. 12), or by the defendant's own admission. (*R.* v. *Hall*, 1 Str. 416.) But such admission will not be extended beyond its exact terms. Thus, an admission that the defendant wrote the libel is no admission that he [* 562] also published it. (*The Seven Bishops' case*, 4 St. Tr. 300.) An admission that defendant was the editor of a periodical at a certain date is no evidence to connect him with a libel published in the same periodical at a later date. (*Macleod* v. *Wakley*, 3 C. & P. 311.) But where the defendant admitted that he was the author of the book containing the libel, "errors of the press and some small variations excepted," it was held that this was sufficient to entitle the prosecutor to put in the book, and that it lay upon the defendant to show that there were material variances. (*R.* v. *Hall*, 1 Str. 416.) A witness may be asked if he knows who wrote the libel; but if he answers "yes," he cannot be compelled to name

the person, because it may be himself. (*R.* v. *Slaney*, 5 C. & P. 213.) The plaintiff may even call the defendant as a witness, nor can counsel for the defendant object that no relevant question can be asked him that will not tend to criminate him. The defendant must go into the box, and take the objection himself, when the question is asked. No one can take it for him. He must state on oath in open court that in his opinion to answer the question would tend to criminate him. (*Boyle* v. *Wiseman*, 10 Ex. 647 ; 24 L. J. Ex. 160 ; 24 L. T. (Old S.) 274.)

Where the facts are in dispute, it will be for the jury to decide whether the defendant wrote the libel, whether it was ever published to a third person other than the plaintiff, whether the office where the libel was purchased was the defendant's or not, &c., &c. When the facts are found, it is for the judge to decide whether there has been a publication in law by the defendant.

Proof of the Libel.

The libel itself must be produced at the trial : the jury are entitled in all cases to see it. (*Wright* v. *Woodgate*, 2 C. M. & R. 573 ; *Gilpin* v. *Fowler*, 9 Ex. 615 ; 23 L. J. Ex. 156.) The defendant is entitled to have the whole of it read. (*Cooke* v. *Hughes*, R. & M. 112.) The original must be carefully traced, where it has passed through many hands (*Fryer* v. *Gathercole*, 4 Ex. 262 ; 18 L. J. Ex. 389 ; *Adams* v. *Kelly*, Ry. & Moo. 157), and the identical one published must be produced or accounted for. (*R.* v. *Rosenstein*, 2 C. & P. 414.) But where a large number of copies are printed from the same type, or lithographed at the same time by the same process, none of them are copies in the legal sense of the word. They are are all counterpart originals, and each is primary evidence of the contents of the rest. (*R.* v. *Watson*, 2 Stark. 129 ; *Johnson* v. *Hudson and Morgan*, 7 A. & E. 233, n.)

[* 563] Where the libel is contained in a letter or memorial sent to a Secretary of State, or to some Government department, an objection is often raised to its production on grounds of public policy. If this objection appears to the judge to be well founded, no evidence can be given of the contents of such letter or memorial. In *Beatson* v. *Skene* (5 H. & N. 838 ; 29 L. J. Ex. 430 ; 4 Jur. N. S. 780) it was decided that the objection must be taken by the head of the public department of State, who is alone able to judge. This decision was followed by Lord Coleridge in November, 1877, in the case of *Swann* v. *Vines*, cited 37 L. T. 469. (See also *M'Elveney* v. *Connellan*, 17 Ir. C. L. R. 55.) The rule on the point is that "the court is entitled to have the pledge and security of the head officer of State to give the reason for the non-production of those documents which it is objected to produce, and to demand that he shall come into the witness-box, and there say that he is the head of the department, and objects to such and such documents being produced, specifying them, on the ground of public policy." (*Per* Grove, J., in *Kain* v. *Farrier*, 37 L. T. 470.) But in the case of *Spackman* v. *Gibney*, tried before the same

learned judge at the Bristol Spring Assizes, 1878, the Government clerk, who had brought down the document in obedience to his subpœna, refused to produce it, stating that the Home Secretary had ordered him to object on grounds of public policy; and the learned judge refused to trouble Mr. Cross to come down to Bristol to repeat what his clerk had said. But a letter written by a private individual to the Chief Secretary of the Postmaster General complaining of the conduct of the guard of the Exeter mail, though it may be a privileged communication in the sense that the plaintiff must prove actual malice, is not a document privileged from production on the ground of public policy. (*Blake* v. *Pilfold*, 1 Moo. & Rob. 198.)

If the original libel has been lost or destroyed, secondary evidence may of course be given of it (*Rainy* v. *Bravo*, L. R. 4 P. C. 287; 20 W. R. 873; *Gathercole* v. *Miall*, 45 M. & W. 319), except where the libel is contained in an official document, which is privileged from production on the ground of public policy, in which case the same public policy requires that no secondary evidence of its contents shall be given. (*Home* v. *Bentinck*, 2 Brod. & B. 130; *Anderson* v. *Hamilton*, *ib.* 156, n.; *Stace* v. *Griffith*, L. R. 2 P. C. 428; 6 Moore, P. C. C. N. S. 18; 20 L. T. 197; *Dawkins* v. *Lord Rokeby* (Ex. Ch.), L. R. 8 Q. B. 255.) The plaintiff is also entitled to give secondary evidence of the contents of the libel, if the original is in the defendant's possession and is not produced, after notice to produce it has been [* 564] served on the defendant's solicitor a reasonable time before the trial. (*R.* v. *Boucher*, 1 F. & F. 486.) So also where the libel is in the possession of some one beyond the jurisdiction of the court, who refuses to produce it, on request, although informed of the purpose for which it is required. (*Boyle* v. *Wiseman*, 10 Ex. 647; 24 L. J. Ex. 160; *Newton* v. *Chaplin*, 10 C. B. 56; *R.* v. *Llanfaethly*, 2 E. & B. 940; 23 L. J. M. C. 33; *R.* v. *Aickles*, 1 Leach, 330.) As to copies in the possession of the defendant's solicitor, see *Paris* v. *Levy*, 2 F. & F. 73. Where the libel is written or placarded on a wall, so that it cannot conveniently be brought into court, secondary evidence may be given of its contents. (*Per* Lord Abinger in *Mortimer* v. *M'Callan*, 6 M. & W. at p. 68; *Bruce* v. *Nicolopulo*, 11 Ex. at p. 133; 24 L. J. Ex. at p. 324.)

All questions as to the admissibility of secondary evidence are for the judge, and should be decided by him then and there. (*Boyle* v. *Wiseman*, 11 Ex. 360; 24 L. J. Ex. 224; 25 L. T. (Old S.) 203.)

If the words proved differ materially from those set out in the statement of claim, this is a variance which would formerly have been fatal. (*Bell* v. *Byrne*, 13 East, 554; *Tabart* v. *Tipper*, 1 Camp. 350; *Cartwright* v. *Wright*, 1 D. & Ry. 230; *Cook* v. *Stokes and Wife*, 1 Moo. & R. 237; *Rainy* v. *Bravo*, L. R. 4 P. C. 287; 20 W. R. 873.) But now the judge has ample power to amend the record, if in his discretion he considers such amendment can be made without prejudice to the defendant. (Order XXVIII. rr. 1, 6.) But no amendment will be made, the result of

which will be to substitute a totally different cause of action for the former one (*C*—— v. *Lindsell*, 11 J. P. 352), or to render the statement of claim demurrable. (*Martyn* v. *Williams*, 1 H. & N. 817; 26 L. J. Ex. 117; *Caulfield* v. *Whitworth*, 16 W. R. 936; 18 L. T. 527.) The defendant is entitled to an adjournment if he really desires to justify the words newly inserted in the statement of claim by such amendment. (*Saunders* v. *Bate*, 1 H. & N. 402. And see *Foster* v. *Pointer*, 9 C. & P. 718; *May* v. *Brown*, 3 B. & C. 113; *Lord Churchill* v. *Hunt*, 2 B. & Ald. 685.)

Proof of the speaking of the Slander.

In cases of slander, the only way to prove publication is by calling those who heard the defendant speak the words. It is not, in strictness, sufficient to prove that the defendant spoke words *equivalent* to those set out in the statement of claim (*Armitage* v. *Dunster* (1785) 4 Dougl. 291; *Maitland and others* v. *Goldney and another* (1802), 2 East, 426.) Thus, where the declaration alleged that the defendant [* 565] stated as a fact that "A. could not pay his laborers," and the evidence was that he had asked a question, "Have you heard A. cannot pay his laborers?" the plaintiff was nonsuited. (*Barnes* v. *Holloway* (1799), 8 T. R. 150.) But now, if the words proved convey practically the same meaning as the words laid, the variance will be held immaterial, or else the judge will amend. (*Doncaster* v. *Hewson*, 2 Man. & Ry. 176; *Sydenham* v. *Man* (1617), Cro. Jac. 407; *Orpwood* v. *Barkes, vel Parkes*, 4 Bing. 261; 12 Moore, 492; *Smith* v. *Knowelden*, 2 M. & Gr. 561.)

It was never necessary, however, to prove all the words laid in the declaration, if such of them as are proved are intelligible and actionable by themselves. (*Per* Lawrence, J., 2 East, 434.)

If the witness committed the words to writing shortly after the defendant uttered them, he may refer to such writing to refresh his memory; but it must be the original memorandum that is referred to, not a fair copy. (*Burton* v. *Plummer*, 2 A. & E. 343.) And so where the action is for procuring a libel to be published by making a verbal statement to the reporter of a newspaper, who took it down in writing, the original writing taken down by the reporter and handed by him to the editor must be produced in court; otherwise it will not appear that it was the same or substantially the same as the libel which appeared in the newspaper. (*Adams* v. *Kelly*, Ry. & Moo. 157.)

Where the governor of a British colony spoke to the Attorney-General in his official capacity words defamatory of the plaintiff, and the Attorney-General was called as a witness in an action against the governor, it was held that he was not bound to disclose what the governor had said to him. (*Wyatt* v. *Gore*, Holt, N. P. 299.)

If the words spoken be in a foreign language, some one must be called to prove their meaning; and it must be further proved that those who heard them understood that language; else there is no publication. But this will be presumed where the words are spoken in the vernacular of the locality. (*Ante*, p. 109.)

Evidence as to the Innuendo.

Whenever the words used are not well-known and perfectly intelligible English, but are foreign, local, technical, provincial, or obsolete expressions, parol evidence is admissible to explain their meaning, provided such meaning has been properly alleged in the statement of claim by an innuendo. The rule is the same where words which have a meaning in ordinary English are yet, in the particular instance [*566] before the court, clearly used not in that ordinary meaning, but in some peculiar sense; as in the case of many slang expressions. But where the words are well-known and perfectly intelligible English, evidence cannot be given to explain that meaning away, unless it is first in some way shown that that meaning is for once inapplicable. This may appear from the words themselves: to give them their ordinary English meaning may make nonsense of them. But if with their ordinary meaning the words are perfectly good sense as they stand, facts must be given in evidence to show that they may have conveyed a special meaning on this particular occasion. After that has been done, a bystander may be asked, "What did you understand by the expression used?" But without such a foundation being laid, the question is not admissible. (*Daines* v. *Hartley*, 3 Exch. 200; 18 L. J. Ex. 81; 12 Jur. 1093; *Barnett* v. *Allen*, 3 H. & N. 376; 27 L. J. Ex. 415; *Humphreys* v. *Miller*, 4 C. & P. 7; *Duke of Brunswick* v. *Harmer*, 3 C. & K. 10.) And if it be put and answered, the answer is not evidence; the jury must not act on it. (*Simmons* v. *Mitchell*, 6 App. Cas. 156; 50 L. J. P. C. 11; 29 W. R. 401; 43 L. T. 710.) And this is so, whether the word can be found in the last edition of the English dictionary or not. (*Homer* v. *Taunton*, 5 H. & N. 661.) Figurative or allegorical terms of a defamatory character, if of well-known import, need no evidence to explain their meaning; *e.g.* words imputing to a person the qualities of the "frozen snake" in the fable. (*Hoare* v. *Silverlock*, 12 Q. B. 624; 17 L. J. Q. B. 306.) Nor do historical allusions or comparisons to odious, notorious or disreputable persons: thus, where the conduct of the plaintiff, in a case which he conducted as attorney for one of the parties, was compared to that of "Messrs. Quirk, Gammon and Snap," the novel "Ten Thousand a Year" was put in and taken as read. (*Woodgate* v. *Ridout*, 4 F. & F. 202.)

Wherever the words sued on are susceptible both of a harmless and an injurious meaning, it will be a question for the jury to decide which meaning was in fact conveyed to the hearers or readers at the time of publication. It will be of no avail for the defendant to urge (except, perhaps, in mitigation of damages) that he intended the words to convey the innocent meaning, if the jury are satisfied that ordinary bystanders or readers would certainly have understood them in the other sense. (*Fisher* v. *Clement*, 10 B. & C. 472.) Every man must be taken to have intended the natural and probable consequences of his act. The plaintiff may give evidence of surrounding circumstances from which a defamatory meaning can be inferred; he may call witnesses to state how they understood

the libel ; though the jury [*567] are not bound to adopt the opinions of such witnesses. (*Broome* v. *Gosden*, 1 C. B. 732.) Also in this case evidence of subsequent words of the same import may be given, so as to explain and point the libel charged. (*Pearce* v. *Ornsby*, 1 M. & Rob. 455 ; *ante*, p. 98.)

The plaintiff may also show that the words, though apparently commendatory, were spoken ironically.

If, however, the words are in their primary sense not actionable, and there is no evidence of any facts known both to the writer and the person to whom he wrote, which could reasonably induce the latter to put upon them any actionable secondary meaning, the judge should stop the case. (*Capital and Counties Bank* v. *Henty and Sons*, (C. A.) 5 C. P. D. 514 ; 49 L. J. C. P. 830 ; 28 W. R. 851 ; 43 L. 651 ; (H. L.) 7 App. Cas. 741 ; 52 L. J. Q. B. 232 ; 31 W. R. 157 ; 47 L. T. 662 ; 47 J. P. 214 ; *ante*, p. 115 ; *Ruel* v. *Tatnell*, 29 W. R. 172 ; 43 L. T. 507.) So, too, if the words are not reasonably susceptible of the defamatory meaning put upon them by the innuendo, the judge should nonsuit the plaintiff. (*Mulligan* v. *Cole and others*, L. R. 10 Q. B. 549 ; 44 L. J. Q. B. 153 ; 33 L. T. 12 ; *ante*, p. 117.) If, however, in his opinion the words are capable of the meaning ascribed to them by the innuendo, and there is any evidence to go to the jury that they were used with that meaning, then it will be for the jury to decide whether in fact the words were understood in that sense by those who heard or read them.

Proof that the Words refer to the Plaintiff.

If the libel does not name the plaintiff, there may be need of some evidence to show who was meant. The plaintiff may give evidence of all "surrounding circumstances ;" *i. e.*, the cause and occasion of publication, later statements made by the defendant, and other extraneous facts which will explain and point the allusion. The plaintiff may also call at the trial his friends or others acquainted with the circumstances, to state that on reading the libel they at once concluded that it was aimed at the plaintiff. (*Broome* v. *Gosden*, 1 C. B. 728 ; *R.* v. *Barnard*, *Ex parte Lord R. Gower*, 43 J. P. 127 ; *ante*, p. 133.) It is not necessary that all the world should understand the libel ; it is sufficient if those who know the plaintiff can make out that he is the person meant. (*Bourke* v. *Warren*, 2 C. & P. 310.) [In *Eastwood* v. *Holmes* (1 F. & F. 349), Willes, J., would not allow a witness to be asked, "To whom did you understand the words to apply ?" on the ground that that was *the* question for the jury. But the circumstances [* 568] of that case were peculiar.] Evidence that the plaintiff was jeered at at a public meeting is admissible to show that his neighbors understood the libel as referring to him. (*Cook* v. *Ward*, 4 M. & P. 99; 6 Bing 412.) So, in *Du Bost* v. *Beresford* (2 Camp. 511), Lord Ellenborough held that the declarations made by spectators, while they were looking at a libellous caricature, were admissible in evidence to show whom the figures were intended to represent.

Proof that the Words were spoken of the Plaintiff in the way of his Office, Profession or Trade.

It is not enough for the plaintiff to prove his special character, and that the words refer to himself; he must further prove that the words refer to himself in that special character, if they be not otherwise actionable. It is a question for the jury whether the words were spoken of the plaintiff in the way of his office, profession, or trade. It is by no means necessary that the defendant should expressly name the plaintiff's office or trade at the time he spoke, if his words must necessarily affect the plaintiff's credit and reputation therein. (*Jones* v. *Littler*, 7 M. & W. 423; 10 L. J. Ex. 171. See *ante*, p. 125.) But often words may be spoken of a professional man which, though defamatory, in no way affect his profession, *e. g.*, an imputation that an attorney had been horsewhipped off the course at Doncaster (*Doyley* v. *Roberts*, 3 Bing. N. C. 835; 5 Scott, 40; 3 Hodges, 154; *ante*, p. 77), or that a physician had committed adultery. (*Ayre* v. *Craven*, 2 A. & E. 2; 4 N. & M. 220; *ante*, p. 78. See further, *ante*, pp. 67—71.) But any imputation on the solvency of a trader, any suggestion that he had been bankrupt years ago, is clearly a reflection on him in the way of his trade. (*Ante*, p. 80.)

Evidence of Malice.

The judge must decide whether the occasion is or is not privileged, and also whether such privilege is absolute or qualified. If he decide that the occasion was one of absolute privilege, the defendant is entitled to judgment, however maliciously and treacherously he may have acted. If, however, the privilege was only qualified, the *onus* lies on the plaintiff of proving actual malice. (*Clark* v. *Molyneux*, (C. A.) 3 Q. B. D. 237; 47 L. J. Q. B. 230; 26 W. R. 104; 37 L. T. 694.) This he may do either by *extrinsic* evidence of personal ill-feeling (*ante*, pp. 275, 281), or by *intrinsic* evidence, such as the exaggerated language of the libel, the mode and extent of [*569] publication, and other matters in excess of the privilege. (*Ante*, pp. 281—290.) Any other words written or spoken by the defendant of the plaintiff, and indeed all previous transactions or communications between the parties, are evidence on this issue. The defendant often makes the mistake of cross-examining the plaintiff severely on such previous matters, with the view no doubt of showing that in all these transactions the plaintiff was solely to blame. The jury, as a rule, will hold both parties to a silly quarrel equally blameworthy. But even if they adopt the defendant's view that all the provocation was given by the plaintiff, this will only tell against the defendant. For such provocation must produce a feeling of resentment, or at least of injured innocence, in the defendant's mind; and if, under the influence of such feeling, he writes or speaks a falsehood of his late antagonist, such falsehood will probably be deemed spiteful and malicious.

Placing a plea of justification on the record is no evidence of malice. (*Wilson* v. *Robinson*, 7 Q. B. 68 ; 14 L. J. Q. B. 196 ; 9 Jur. 726 ; *Caulfield* v. *Whitworth*, 16 W. R. 936 ; 18 L. T. 527.) But persisting in it may be, if there be any other circumstance in the case suggesting malice, but not otherwise. (*Warwick* v. *Foulkes*, 12 M. & W. 508.) Care must be taken in citing *Simpson* v. *Robinson* (12 Q. B. 511), to refer to the judgments of the court ; as the headnote is declared by Willes, J., in *Caulfield* v. *Whitworth*, to be misleading. Proof that the defendant at the time of publication knew that what he was saying or writing was false, is proof positive of malice. Proof that in fact the words are untrue is no evidence of malice (*ante* p. 272) ; the falsity of the words is indeed always presumed in the plaintiff's favour. (*Browne* v. *Croome*, 2 Stark. 297 ; *Cornwall* v. *Richardson*, R. & M. 305 ; *Guy* v. *Gregory*, 9 C. & P. 584 ; *Brine* v. *Bazalgette*, 3 Exch. 692 ; 18 L. J. Ex. 348. There must have been some other facts suggesting malice in *Palmer* v. *Hummerston* (1 Cababe & Ellis, 36) ; or else Day, J., thought it safer to leave the question to the jury and so put an end to the litigation. Hence the plaintiff cannot, as a rule, give any evidence of his own good character. (*Ante*, p. 310.) But where the parties have been living in the same house for a long time, as master and servant, and the master must have known the true character of his servant, and yet has given a false one, there the plaintiff is allowed to give general evidence of his good character, and to call other servants of the defendant to show that no complaints of misconduct were made against the plaintiff whilst he was in defendant's service ; for such evidence tends to show that defendant, at the time he gave plaintiff a bad character, knew that what he was writing [*570] was untrue, which would be proof positive of malice. (*Fountain* v. *Boodle*, 3 Q. B. 5 ; 2 G. & D. 455 ; *Rogers* v. *Sir Gervas Clifton*, 3 B. & P. 587, *ante*, p. 203.) But in any other case, if no justification be pleaded, and yet the plaintiff's counsel gives evidence of the falsity of the libel, this will let in evidence on the other side of the truth of the statement. (*Per* Lord Ellenborough in *Brown* v. *Croome*, 2 Stark. 298 299.)

Rebutting Justification.

The plaintiff may object at the trial that a plea of justification is insufficient, whether such objection has been taken on the pleadings or no. *Edmonds* v. *Walter and another* (3 Stark. 7) is now bad law. The plaintiff's counsel may, if he chooses, in the first instance rebut the justification ; or he may leave such proof till the reply, when he will know the strength of defendant's case. But he cannot, in the absence of special circumstances, call some evidence to rebut the justification in the first instance, and more afterwards, thus dividing his proof. (*Browne* v. *Murray*, R. & M. 254.)

Evidence of Damage.

The plaintiff need give no evidence of any actual damage where the words are actionable *per se ;* he can nevertheless recover sub-

stantial damages. (*Tripp* v. *Thomas*, 3 B. & C. 427; 1 C. & P. 477; *Ingram* v. *Lawson*, 6 Bing. N. C. 212.) But if the plaintiff has suffered any special damage, this should be pleaded and proved. It cannot be proved unless it has been pleaded. (*Black* v. *Lovering*, 1 Times L. R. 497.) As to what constitutes a special damage, see *ante*, pp. 297—309. As to what damage is too remote, see *ante*, pp. 325—336.

Where the words are not actionable *per se*, the plaintiff cannot prove a general loss of custom; he must call individual customers and friends to state why they have ceased to deal at his shop, or to entertain him. (*Ante*, p. 303.) Such witnesses cannot, however, be called unless their names have been set out in the statement of claim or the particulars. It must also be proved that they heard of the charge against the plaintiff from the defendant, and from no one else. It will not be sufficient to prove that they heard a rumour, and that the defendant set such rumour afloat. (See *ante*, p. 330; *Dixon* v. *Smith*, 5 H. & N. 450; 29 L. J. Ex. 125; *Bateman* v. *Lyall*, 7 C. B. N. S. 638.)

The plaintiff may also call evidence in aggravation of damages, as to which see *ante*, pp. 309—311.

[*571] *Nonsuit.*

Strictly there is no longer such a thing as a nonsuit. Ord. XLI. r. 6 of 1875 has not been re-enacted; and by Ord. XXXVI. r. 39, the judge must direct that judgment be entered, if at all, for one party or the other. Still the word is a convenient one to denote the act of the judge when he withdraws the case from the jury and directs judgment to be entered for the defendant without (or in spite of) their verdict.

It is usually at the close of plaintiff's case that the defendant's counsel submits to the judge that there is no case for him to answer. Some judges, however, decline to consider the question at this stage of the action, unless defendant's counsel at once announces that he intends to call no witnesses.

The judge should direct judgment to be entered for the defendant:—

(1.) If there is no evidence that the defendant published the words at all or (if the Statute of Limitations be pleaded) that he did so within the period prescribed.

(2.) If there is no evidence that the words refer to the plaintiff.

(3.) If the words proved are not actionable *per se*, and there is no evidence of any special damage.

(4.) If the words are actionable by reason only of their being spoken of the plaintiff in the way of his office, profession, or trade, and there is no evidence that the words were so spoken, or that the plaintiff held such office or exercised such profession or trade at the time of publication.

(5.) If the words are not actionable in their natural and primary signification, and there is no innuendo; or if the only innuendo puts upon the words a meaning that they cannot possibly bear. If, how-

ever, it is reasonably conceivable that those addressed might by reason of any facts known to them have put upon the words the secondary meaning ascribed to them by the innuendo, then it will be a question for the jury in which meaning the words were in fact understood. Whenever the words, though primarily not actionable, are yet reasonably susceptible of a defamatory meaning, the judge should not stop the case; if he does so, the Divisional Court will order a new trial. (*Hart and another* v. *Wall*, 2 C. P. D. 146; 46 L. J. C. P. 227; 25 W. R. 373.) "It is only when the judge is satisfied that the publication *cannot* be a libel, and that, if it is found by the jury to be such, their verdict will be set aside, that he is justified in withdrawing the question from their cognizance." (*Per* Kelly, C. B., L. R. 4 Exch. at p. 288.) Where the words of the [*572] libel are ambiguous, allegorical, or in any way equivocal, and the jury have found that they were meant and used in a defamatory sense, the court will not set aside their verdict, unless it can be clearly shown that, on reading the whole passage, there is no possible ground for the construction put upon it by the jury. (*Hoare* v. *Silverlock*, 12 Q. B. 624; 17 L. J. Q. B. 306; *Fray* v. *Fray*, 17 C. B. N. S. 603; 34 L. J. C. P. 45; 10 Jur. N. S. 1153.) But where the words are not reasonably capable of any defamatory meaning, there the judge will be right in directing a nonsuit. (*Hunt* v. *Goodlake*, 43 L. J. C. P. 54; 29 L. T. 472; *Mulligan* v. *Cole and others*, L. R. 10 Q. B. 549; 44 L. J. Q. B. 153; 33 L. T. 12; *ante*, p. 117.)

(6.) If the occasion of publication was one of absolute privilege.

(7.) If the occasion is clearly or admittedly one of qualified privilege, and there is no evidence, or not more than a *scintilla* of evidence, of malice to go to the jury. If the evidence adduced to prove malice is equally consistent with either the existence or the non-existence of malice, the judge should stop the case; for there is nothing to rebut the presumption which the privileged occasion has raised in the defendant's favour. (*Somerville* v. *Hawkins*, 10 C. B. 583; 20 L. J. C. P. 131; 15 Jur. 450; *Harris* v. *Thompson*, 13 C. B. 333; *Taylor* v. *Hawkins*, 16 Q. B. 308; 20 L. J. Q. B. 313; 15 Jur. 746.)

(8.) Where, however, the question of privilege involves matters of fact which are disputed, it will be for the jury to find the facts, and for the judge subsequently to decide whether on the facts so found the occasion is privileged. (*Beatson* v. *Skene*, 5 H. & N. 838; 29 L. J. Ex. 430; 6 Jur. N. S. 780; 2 L. T. 378.) And the judge is not bound to rule whether the occasion is privileged or not till after the defendant has called all his witnesses. (*Per* Cockburn, C. J., in *Hancock* v. *Case*, 2 F. & F. 710.)

The judge at the trial has full power to amend any defect or error in any pleading or proceeding on such terms as may seem just (Ord. XXVIII. rr. 1, 6, 12), and to add or strike out, or substitute, a plaintiff or defendant. (Ord. XVI. r. 12.)

Evidence for the Defendant.

The defendant, as we have seen, is entitled to have the whole libel read, or the whole of the conversation, in which the slander was

uttered, detailed in evidence. If the alleged libel refers to any other document, the defendant is also entitled to have the document read, as part of the plaintiff's case. (*Weaver* v. *Lloyd*, 1 C. & P. 296 ; [*573] *Thornton* v. *Stephen*, 2 M. & Rob. 45 ; *Hedley* v. *Barlow and another*, 4 F. & F. 227.) So where the action is brought for a criticism on the plaintiff's book, no imputation being cast on him personally, it was held that the plaintiff ought to put in the book criticised as part of his own case. (*Strauss* v. *Francis*, 4 F. & F. 939, 1107.) This may save the defendant from the necessity of giving any evidence. But where a paragraph in a subsequent number of a newspaper is given in evidence by the plaintiff to show malice, the rest of the newspaper is no part of plaintiff's case, unless it refers to the special paragraph put in. The defendant is, therefore, not entitled to have other passages in that newspaper read. (*Darby* v. *Ouseley*, 1 H. & N. ; 25 L. J. Ex. 227.)

The defendant's counsel often prefers not to call any witnesses, so as to have the last word with the jury. He relies instead on the cross-examination of the plaintiff's witnesses. These may be cross-examined not only as to the facts of the case, but also "to credit ;" that is, as to matters not material to the issue, with a view of shaking their whole testimony. But in order to prevent the case from thus branching out into all manner of irrelevant issues, it is wisely provided that on such matters the defendant must take the witness's answer : he cannot call any evidence to contradict it. There is one exception. By sect. 24 of the Common Law Procedure Act, 1854, if a witness in any cause be questioned as to whether he has been convicted of any felony or misdemeanour, and if he either denies the fact, or refuses to answer, the opposite party may prove such conviction, however irrelevant the fact of such conviction may be to the matter in issue in the cause. (*Ward* v. *Sinfield*, 49 L. J. C. P. 696 ; 43 L. T. 253.) The right method of proving a conviction at the Assizes or Quarter Sessions, either for this purpose, or as evidence under a plea of justification, is by a certificate under the Common Law Procedure Act, 1854, s. 25, containing the substance and effect of the indictment and conviction, but omitting the formal parts. Both this section, however, and sect. 6 of 28 & 29 Vict. c. 18, are confined to convictions for felony or misdemeanour on indictment. Hence, where the conviction was at petty sessions only, it was decided, in *Hartley* v. *Hindmarsh* (L. R. 1 C. P. 553 ; 35 L. J. M. C. 255 ; 12 Jur. N. S. 502 ; 14 W. R. 862 ; 13 L. T. 795), that either the record itself must be produced, or an examined copy of it. This involves the trouble and expense of having the record duly made up for the purpose. (*Per* Byles, J., L. R. 1 C. P. at p. 556.) But since that decision, the Prevention of Crimes Act, 1871 (34 & 35 Vict. c. 112), has become law ; and though the rest of this act applies [*574] entirely to criminal proceedings, yet sect. 18 contains the words "in any legal proceeding whatever." Hence certificates under that section are now received without objection in civil as well as criminal proceedings.

The defendant must be careful, however, not to increase, by such cross-examination, the amount of damages that may be given against

him. Thus, where the libel consisted of comments in a newspaper on a criminal trial, in which the plaintiff was acquitted, and the defendant's counsel put to the plaintiff a series of questions tending to show that he really had been guilty of the crime with which he was charged, such a course of cross-examination was held a serious aggravation of the libel. (*Risk Allah Bey* v. *Whitehurst*, 18 L. T. 615.) Note, however, that Order XXXVI. r. 37, in no way restricts cross-examination; it is confined to evidence called by the defendant in chief.

Where the words are actionable only because they were spoken of the plaintiff in the way of his trade, the defendant may show that such trade is illegal (*Hunt* v. *Bell*, 1 Bing. 1), if he has pleaded such defence; and it is no objection to such evidence that it also indirectly proves the truth of the defendant's words. (*Manning* v. *Clement*, 7 Bing. 362, 368; 5 M. & P. 211.)

Where it is not alleged that the defendant is the author of the libel, he may give evidence to show that he published it innocently without any knowledge of its contents, as where a porter delivered a sealed packet. (*Day* v. *Bream*, 2 M. & Rob. 54.) But in most cases such evidence will only tend to mitigate the damages; it will not be a defence to the action. (See *ante*, pp. 161, 433.)

The defendant may also give evidence of antecedent conversations and transactions or other circumstances well known to the bystanders, which show that the words were not used in their ordinary signification. Thus, they may have been uttered in joke; or the preceding part of the conversation may limit or qualify the words sued on. But the defendant cannot give in evidence some particular transaction which he had in his mind at the time he spoke, but to which he did not expressly refer, and which was unknown to the person addressed. (*Hankinson* v. *Bilby*, 16 M. & W. 442; 2 C. & K. 440; *Martin* v. *Loeï*, 2 F. & F. 654; *ante*, pp. 106—108.) For the question which the jury have to determine is not "What did the defendant intend?" but "What would a reasonable person have understood from the language used?" So, too, where a libel is unambiguous in itself, and does not refer to any other document, the defendant cannot use any other [*575] document for the purpose of explaining away the natural meaning of the libel.

The defendant's counsel may also urge that the occasion of publication was privileged. (See *ante*, c. VIII. pp. 181—268.) If the facts necessary to raise this defence are not already in evidence, he must call witnesses to prove them. Thus, it is often necessary to put the defendant himself in the box to state the facts as they were presented to him at the date of publication, the information which he received and on which he acted, and all surrounding circumstances. He will also state that he acted *bonâ fide*, and under a sense of duty. But there is danger in calling the defendant in such a case: he will be severely cross-examined, and may let slip some observation which will be seized upon as evidence of malice. It is better, if possible by denying the fact of publication, to compel the plaintiff to call those to whom the defendant wrote or spoke, and to elicit from them, in

cross-examination, circumstances which show that the occasion was privileged. Statements made to the defendant behind the plaintiff's back, and acts to which he was no party, are admissible in evidence on this issue to show the state of the defendant's mind at the moment when he spoke or wrote the words. (*Cockayne* v. *Hodgkisson*, 5 C. & P. 543.)

So where the defence is that the libel complained of is a *bonâ fide* comment on certain facts, the defendant is clearly entitled to prove those facts, unless the judge rules that they are not of public interest. The ruling of Patterson, J., in *R.* v. *Brigstock* (6 C. & P. 184), would not be followed in these days. Of well-known historical facts the court will of course take judicial notice ; all other facts must be proved strictly, and not by hearsay, unless plaintiff will admit them.

But if a publication purports to be a report of a trial, it will, it seems, be assumed in favour of the defendant that such a trial really took place, unless the plaintiff adduces some evidence to the contrary. "We cannot suppose, without proof, that the occurrence of such a trial was mere invention, or that newspapers publish reports of merely imaginary trials." (*Per* Alderson, B., in *Chalmers* v. *Payne*, 5 Tyrw. 769 ; 2 C. M. & R. 159 ; 1 Gale, 69.)

The defendant may also prove a justification. The attempt, if unsuccessful, will aggravate the damages. Strict proof must be given that the whole charge made is true in every particular. Books are no evidence of the facts stated in them. (*Darby* v. *Ouseley*, 1 H. & N. 1 ; 25 L. J. Ex. 227 ; 2 Jur. N. S. 497 ; *Collier* v. *Simpson*, 5 C. & P. 73.) Sometimes a libel contains two or more distinct and severable charges against the plaintiff ; if so, it will tend in mitiga- [*576] tion if the defendant can prove any one of such charges true (see *ante*, p. 176) ; but all of them must be strictly proved to entitle him to a verdict. Where, however, a libel conveys a general charge, and several specific instances are given (as they must be) in the plea or in the particulars as evidence of such general charge, then it is enough for the defendant to prove any two or three of these specific instances which will justify the libel ; he is not bound to prove the whole of his particulars. (*Per* Cockburn, C. J., in *Reg. pros. Lambri* v. *Labouchere*, 14 Cox, C. C. 419.) If the charge made against the plaintiff is that he was *convicted* of an offence, then such conviction may be proved in the manner stated, *ante*, p. 573. (See *Alexander* v. *North Eastern Railway Co.*, 6 B. & S. 340 ; 34 L. J. Q. B. 152 ; 13 W. R. 651.) Though where the libel consists of an incorrect statement of the plaintiff's conviction by a magistrate, the plaintiff may, with a view to the assessment of damages, enter into all the circumstances which led to the conviction, although such evidence tends to show that the conviction was erroneous. (*Gwynn* v. *South Eastern Railway Co.*, 18 L. T. 738). If, however, the imputation is that the plaintiff has *committed* a crime, then the charge must be proved as strictly as on an indictment for the same offence. And here, the fact that the plaintiff had been previously tried and acquitted, or convicted, is irrelevant ; and the record of the criminal trial is not admissible in evidence either way, for the parties are

not the same. (*Justice* v. *Gosling and others*, 12 C. B. 39 ; 21 L. J. C. P. 94 ; *England* v. *Bourke*, 3 Esp. 80.)

Where no justification is pleaded, the defendant can give no evidence of the truth of his words, not even in mitigation of damages. (*Smith* v. *Richardson*, Willes, 20.) But evidence admissible and pertinent under another issue cannot be excluded merely because it happens incidentally to prove the truth of the libel. (*Manning* v. *Clement*, 7 Bing. 362, 368 ; 5 M. P. 211) Thus, if the defendant has pleaded privilege, he may show that he reasonably and *bonâ fide* believed in the truth of the charge he made, and it is no objection that the grounds of his belief are so forcible as to convince every reasonable man of the plaintiff's guilt. (*Huson* v. *Dale*, 19 Mich. 17.) Where the plaintiff, in order to prove malice, has given in evidence other words of the defendant not set out on the record, the defendant may prove the truth of such other words, for he had no opportunity of pleading a justification. (*Stuart* v. *Lovell*, 2 Stark. 93 ; *Warne* v. *Chadwell*, 2 Stark. 457 ; *Collision* v. *Loder*, B. N. P. 10.)

If the present defendant is liable, the fact that some one else is also liable is, of course, no defence. The plaintiff may at his option sue one or all in the same or in different actions. And the fact that [* 577] such other actions are pending is not admissible in evidence. (*Creevy* v. *Carr*, 7 C. & P. 64 ; *ante*, p. 316.) Thus, if an author be sued for a libel he has composed, it is no defence that the publisher has been already sued, and heavy damages recovered against him in another action. (*Frescoe* v. *May*, 2 F. & F. 123 ; *Harrison* v. *Pearce*, 1 F. & F. 567 ; 32 L. T. (Old S.) 298 ; the headnote to the latter case does not state the full force of the ruling of Martin, B.) So, too, that others have previously published the same charges against the plaintiff, and have *not* been sued, is no justification for the defendant's republication. Still less is it any evidence of the truth of such charges. (*R.* v. *Newman*, 1 E. & B. 268 ; 22 L. J. Q. B. 156 ; 3 C. & K. 252 ; Dears. C. C. 85 ; 17 Jur. 617.) It is wholly immaterial that plaintiff omitted to contradict or complain of such previous publications. (*R.* v. *Holt*, 5 T. R. 436 ; *Pankhurst* v. *Hamilton*, 2 Times L. R. 682 ; and *per* Maule, J., in *Ingram* v. *Lawson*, 9 C & P. 333.) If, however, the libel purports on the face of it to be derived from a certain newspaper, the defendant may prove in mitigation of damages that a paragraph to the same effect had appeared in that newspaper. (*Wyatt* v. *Gore*, 1 Holt, N. P. 303 ; see also *ante*, p. 315.) The defendant may not give evidence that there was a rumour current to the same effect as the words he spoke. (*Ante*, p. 312.) If the defendant relies on sect. 2 of Lord Campbell's Act, he must, as a rule, give some evidence to show affirmatively that there was no gross negligence. (*Per* Wills, J., in *Peters and another* v. *Edward and another*, 3 Times L. R. 423 ; and see *ante*, p. 322.) As to other evidence in mitigation of damages, see *ante*, pp. 312—324. And now by Order XXXVI. r. 37 :— "In action for libel or slander, in which the defendant does not by his defence assert the truth of the statement complained of, the defendant shall not be entitled on

the trial to give evidence in chief, with a view to mitigation of damages, as to the circumstances under which the libel or slander was published, or as to the character of the plaintiff, without the leave of the judge, unless seven days at least before the trial he furnishes particulars to the plaintiff of the matters as to which he intends to give evidence." This rule in no way alters the law laid down in *Scott* v. *Sampson* (8 Q. B. D. 491 ; 51 L. J. Q. B. 380 ; 30 W. R. 541 ; 46 L. T. 412 ; 46 J. P. 408), save only that it relieves the defendant from the necessity of pleading such matters in his defence. For the form of the notice under the rule, see Precedent, No. 68, *post*, p. 656.

[* 578]

Withdrawing a Juror.

Actions of defamation are often compromised before the judge comes to sum up the evidence. A juror is often withdrawn, sometimes at the suggestion of the judge. This means that neither party cares for the case to proceed. If no special terms are agreed on, the effect of withdrawing a juror is that the action is at an end, that no fresh action can be brought on the same libel or slander, and that each party pays his own costs. (See *Strauss* v. *Francis*, 4 F. & F. 939, 1107 ; 15 L. T. 674 ; *Moscati* v. *Lawson*, 7 C. & P. 35, note ; *Norburn* v. *Hilliam*, L. R. 5 C. P. 129 ; 39 L. J. C. P. 183 ; 18 W. R. 602 ; 22 L. T. 67.) If any other terms be agreed on, they should be indorsed on counsel's briefs, and each indorsement signed by the leading counsel on both sides. Counsel has full authority to make such a compromise, unless expressly forbidden to do so by the client at the time. (*Strauss* v. *Francis*, L. R. 1 Q. B. 379 ; 35 L. J. Q. B. 133 ; 12 Jur. N. S. 486 ; 14 W. R. 634 ; 14 L. T. 326 ; *Davis* v. *Davis*, 13 Ch. D. 861 ; 28 W. R. 345.) The terms of such a compromise will be strictly enforced, if necessary, by an order of the court. (*Riley* v. *Byrne*, 2 B. & Ad. 779 ; *Tardrew* v. *Brook*, 5 B. & Ad. 880.) If after such a compromise the defendant reiterates the libel, the judge may give leave for the action to proceed. (*Thomas* v. *Exeter Flying Post Co.*, 18 Q. B. D. 822 ; 56 L. J. Q. B. 313 ; 56 L. T. 361.)

Summing-up.

The judge now sums up the facts of the case to the jury, and directs them as to the law. (See sect. 22 of Judicature Act, 1875.) He is not bound to state to the jury, as matter of law, whether the publication complained of be a libel or not. (*Baylis* v. *Lawrence*, 11 A. & E 920 ; *Hearne* v. *Stowell*, 12 A. & E. 719 ; 11 L. J. Q. B. 25 ; 4 P. & D. 696,) The proper course is for him to define what is a libel in point of law, and to leave it to the jury to say, as men of ordinary intelligence, whether the publication in question falls within that definition. (*Parmiter* v. *Coupland and another*, 6 M. & W. 105 ; approved in *Cox* v. *Lee*, L. R. 4 Ex. 284 ; 38 L. J. Ex. 219 ; *Grant* v. *Yates*, 2 Times L. R. 368.) The jury are bound to take the judge's definition of a libel, and decide in accordance

therewith (*Levi* v. *Milne*, 4 Bing. 195 ; 12 Moore, 418) ; though the question for them, "Libel or no libel," is not precisely the same as "What is the legal definition of an actionable libel?" (*Per* Barry, J., in *Stannus* v. *Finlay*, Ir. R. 8 C. L. 264.) In a proper case the jury [* 579] should also be reminded that the question for them is not "did the defendant intend to injure the plaintiff?" but, "Has he in fact injured the plaintiff's reputation?"

Where other libels, &c., have been given in evidence to prove malice, the judge should caution the jury not to give any damages in respect of them. (*Pearson* v. *Lemaitre*, 5 M. & Gr. 700.) But the omission of the judge to give such caution is not a misdirection. (*Darby* v. *Ouseley*, 1 H. & N. 1 ; 25 L. J. Ex. 229.)

Verdict.

The jury now consider their verdict. They should look at the whole of the publication to see whether it is calculated to injure the plaintiff's character, not study detached and isolated sentences. The conclusion may modify the commencement, and if so, "the bane and antidote must be taken together." (*Per* Alderson, B., in *Chalmers* v. *Payne*, 2 C. M. & R. 159 ; see also *Hunt* v. *Algar and others*, 6 C. & P. 245 ; *R.* v. *Lambert and Perry*, 2 Camp. 398.)

Where the words are actionable *per se*, the amount of damages is entirely a matter for the jury. They are not confined to the pecuniary loss actually sustained by the plaintiff. (*Ante*, p. 295.) They may consider the libel itself, the mode and extent of publication, and the malice evinced by the defendant. Also, in an action against a newspaper, they may have regard to the gross negligence shown by the editor in allowing the libel to appear in print. (*Smith* v. *Harrison*, 1 F. & F. 565.) The jury must assess the damages once for all, as no fresh action can be brought for any subsequent damage. (*Fitter* v. *Veal*, 12 Mod. 542 ; B. N. P. 7 ; *Gregory and another* v. *Williams*, 1 C. & K. 568 ; *ante*, pp. 295, 306.) And in assessing the damages, the jury should not regard at all the question of costs. (*Poole* v. *Whitcomb*, 12 C. B. N. S. 770 ; *Levi* v. *Milne*, 4 Bing. 915 ; 12 Moore, 418.) But they can not find a verdict for the plaintiff without awarding him some damages. (*Per* Lord Coleridge, C. J., in *Wisdom* v. *Brown*, 1 Times, L. R. 412.)

Costs.

There is no longer any need to ask for a certificate for the general costs of the suit. The successful party now gets his costs as of right, unless the judge deprives him of them for good cause. (Order LXV. r. 1, *ante*, p. 365.) Thus if there be a verdict for the plaintiff for nominal damages only, his counsel should say nothing about costs ; it is the duty of the defendant's counsel to ask the judge to interfere. But it is otherwise with special costs, such as costs of a special jury, of a commission to take evidence abroad, or of photographic copies of [* 580] the libel : the party who has required these will have to pay for them unless he obtain an

order for their allowance on taxation before judgment is entered. (*Ante*, p. 368.) If a married woman having general separate estate fail in an action of libel or slander, she may be condemned in costs, although her husband was joined with her as a co-plaintiff or a co-defendant. (*Newton and wife* v. *Boodle and others*, 4 C. B. 359; 18 L. J. C. P. 73; *Morris* v. *Freeman and wife*, 3 P. D. 65; 47 L. J. P. D. & A. 79; 27 W. R. 62; 39 L. T. 125; and see the remarks of Jessel, M. R., in *Besant* v. *Wood*, 12 Ch. D. 630; 40 L. T. 453; and sects. 1 and 13 of the Married Women's Property Act, 1882, *ante*, pp. 396, 401.)

If there is any thought of further proceedings, the unsuccessful party should ask the judge to stay execution; which the judge will do if he thinks there is any ground for an application to the court. The usual order is that execution be stayed for eight days, and if within that time notice of motion be served and £——— brought into court, that execution be further stayed till the motion be disposed of.

Proceedings after Judgment.

When judgment has been entered after a trial with a jury, the unsuccessful party must either move to Divisional Court for a new trial under Order XXXIX., notice of which must be served within the time stated in rule 4, and entered before the day named for making the motion; or he may move the Court of Appeal to set aside the judgment on the ground that on the verdict as entered, the judgment directed was wrong (Order XL. r. 4), or upon exceptions annexed to the record, in accordance with sect. 22 of the Judicature Act, 1875. The Divisional Court has full power under Order XL. r. 10, upon an application for a new trial, to set aside the judgment entered and enter final judgment for the party unsuccessful at the trial, if they are of opinion that the findings and the judgment at the trial can not stand, and if they have before them all the materials necessary for finally determining the questions in dispute. (*Hamilton & Co.* v. *Johnson & Co.*, (C. A.) 5 Q. B. D. 263; 49 L. J. Q. B. 155; 28 W. R. 879; 41 L. T. 461.) So, too, if the unsuccessful party moves for judgment in the Court of Appeal, and the court is dissatisfied with the findings as to any matter of fact, it may set aside the verdict and judgment entered, and direct that a new trial shall be had (Order LVIII. r. 5), and *vice versâ* (*Miller* v. *Toudmin*, (C. A.) 17 Q. B. D. 603; 55 L. J. Q. B. 445; 34 W. R. 695).

It is only when the appellant contends that the findings of the jury have not been properly entered, or that, if properly entered, still the [*581] judgment directed thereon is wrong, that he must move the Court of Appeal in the first instance. If he complains of the verdict as recorded, then, although the judge directed such verdict, he must apply to the Divisional Court within the time allowed for a new trial. (*Yetts and another* v. *Foster*, (C. A.) 3 C. P. D. 437; 26 W. R. 745; 38 L. T. 742.) Thus, if the judge is asked to direct a verdict for the defendant, on the ground that there is no

evidence to go to the jury in support of the plaintiff's case, then, whether he grants or refuses this application, the only course by which his decision can be reviewed is by motion for a new trial in the Divisional Court; for the Court of Appeal, as a rule, will not in the first instance review the finding of a jury. (*Davies and others*, v. *Felix and others*, (C. A.) 4 Ex. D. 32; 48 L. J. Ex. 3; 27 W. R. 108; 39 L. T. 322; *Etty* v. *Wilson*, (C. A.) 3 Ex. D. 359; 47 L. J. Ex. 664; 39 L. T. 83; *Clarke* v. *Midland Railway Co.*, 44 L. T. 131.) Hence, if the unsuccessful party moves both for a new trial, and also for judgment on the findings as entered, the Divisional Court will hear both motions. (Order XL. r. 5.)

Whenever the action is tried with a jury, even though it was brought in the Chancery Division, any motion for a new trial must be made to a Divisional Court of the Queen's Bench Division. (Order XXXIX. r. 1.) But in all cases where the trial is by a judge without a jury, any application for a new trial must be made direct to the Court of Appeal (*ib.*), which may either grant a new trial or order judgment to be entered for the appellant, as justice may require, whatever the terms of the notice of motion may be. (Order LVIII. r. 4; *Jones* v. *Hough*, (C. A) 5 Ex. D. 115, 125; 49 L. J. C. P. 211; 42 L. T. 108; *Waddell* v. *Blockey*, (C. A.) 10 Ch. D. 416; 27 W. R. 233; 40 L. T. 286.)

New Trial.

An application for a new trial may be made on the ground that the verdict is against the weight of evidence, that the damages are excessive or inadequate, or on the ground of misdirection or surprise. That no notice of trial was given, or that the jury misbehaved, may also be ground for a new trial.

But a new trial will not be granted on the ground of misdirection or improper admission or rejection of evidence, if the party showing cause against it can satisfy the court that no substantial wrong or miscarriage has been thereby occasioned. (Order XXXIX. r. 6; *Anthony* v. *Halstead*, 37 L. T. 433; *Faund* v. *Wallace*, 35 L. T. 361.) And then the court may grant a new trial as to so much of the matter only as the miscarriage affects, without interfering with the decision [*582] upon any other question. (*Marsh* v. *Isaacs*, 45 L. J. C. P. 505.) So, too, the court may grant a new trial as against one defendant without granting it as to all; though notice of motion must be served on all. (*Price* v. *Harris*, 10 Bing. 331; *Purnell* v. *G. W. Ry. Co. and Harris*, (C. A.) 1 Q. B. D. 636; 45 L. J. Q. B. 687; 24 W. R. 720, 909; 35 L. T. 605.)

The question of libel or no libel is pre-eminently one for a jury; the court will rarely interfere to set aside a verdict or grant a new trial on the ground that the verdict was against the weight of evidence; especially where the question left to the jury was whether the matter complained of was or was not fair comment on the acts of a public man. (*Odger* v. *Mortimer*, 28 L. T. 472.) And whenever the words are fairly susceptible both of an innocent and of an actionable meaning, the finding of the jury is final; whichever con-

struction they may have placed upon the words will be upheld. (*Burgess* v. *Bracher* (1724), 8 Mod. 240 ; 2 Ld. Raym. 1366 ; 1 Stra. 594 ; *Walter* v. *Beaver*, and *Naden* v. *Micocke* (1684), 3 Lev. 166 ; Sir T. Jones, 235 ; 2 Ventr. 172 ; 3 Salk. 325 ; *Grant* v. *Yates*, 2 Times L. R. 368.) "The court never, or very rarely, grants new trials in actions for words." (*Per* Holt, C. J., *Anon.* (1696), 2 Salk. 644.)

A new trial will, however, be granted when the matter complained of is clearly libellous, and there is no question as to the fact of publication, or as to its application to the plaintiff, and yet the jury have perversely found a verdict for the defendant, in spite of the summing-up of the learned judge. (*Levi* v. *Milne*, 4 Bing. 195 ; *ante*, p. 131 ; *Hakewell* v. *Ingram*, 2 C. L. R. 1397.) But unless the jury are manifestly wrong, unless the court can say with certainty that there has been a miscarriage of justice, no new trial will be granted. (*Per* Tindal, C. J., in *Broome* v. *Gosden*, 1 C. B. 731.) If the judge directs the jury that the publication is in law a libel, and the court above hold that it is not, a new trial will be granted on the ground of misdirection. (*Hearne* v. *Stowell*, 12 A. & E. 719 ; 11 L. J. Q. B. 25 ; 4 P. & D. 696.)

The question whether an apology was or was not sufficient is peculiarly a question for the jury, and their decision cannot be reviewed or set aside by the court. (*Risk Allah Bey* v. *Johnstone*, 18 L. T. 620.)

So on any other issue, a new trial will not be granted on the ground that the verdict was against the weight of evidence if the verdict was one which reasonable men could have found. (*Webster* v. *Friedeberg*, (C. A.) 17 Q. B. D. 736 ; 55 L. J. Q. B. 493 ; 34 W. R. 728 ; 55 L. T. 49, 295.) A new trial will not be granted on the ground that the jury expressed an opinion during the judge's summing-up incon- [*583] sistent with their subsequent verdict (*Napier* v. *Daniel and another*, 3 Bing. N. C. 77 ; 3 Scott, 417) ; nor on the ground that either judge or jury prematurely expressed a strong opinion as to the case either way. (*Lloyd* v. *Jones*, 7 B. & S. 475.) It would be otherwise if a juror before being sworn had expressed a determination to give a verdict in favour of the plaintiff. (*Ramadge* v. *Ryan*, 9 Bing. 333 ; 2 Moo. & Sc. 421.)

In actions of defamation the court very rarely grants a new trial on the ground that the damages are either too small or too great. "The assessment of damages is peculiarly the province of the jury in an action for libel." (*Davis & Sons* v. *Shepstone*, 11 App. Cas. 187 ; 55 L. J. P. C. 51 ; 34 W. R. 722 ; 55 L. T. 1 ; 50 J. P. 709 ; *Maskelyne* v. *Bishop*, Times for December 3rd, 1885.) Still there is no inflexible rule on the subject. Scroggs, J., indeed, contended, in *Lord Townshend* v. *Dr. Hughes* (2 Mod. 150), that the court had no power to order a new trial on the ground that the damages (£4,000) were excessive ; but Atkins, J., was of the contrary opinion, and gave an instance in which the Court of Queen's Bench had done so. The court, however, declined to exercise their power both in that case and in *Highmore* v. *Earl and Countess of Harrington* (3 C. B. N. S. 142), where £750 damages were awarded. A new trial

will only be granted where the amount of damages is so large as to satisfy the court that the jury acted perversely and with partiality, or grossly misconceived the case on a matter of principle. Whenever there is any evidence of malice, the jury are entitled to give vindictive damages. In a case where the plaintiff is entitled to substantial damages, and a verdict is given for the plaintiff, which cannot be impeached except on the ground that the damages are excessive, the court has power to refuse a new trial, on the plaintiff alone, and without the defendant, consenting to the damages being reduced to such an amount as the court would consider not excessive had they been given by the jury. (*Belt* v. *Lawes*, (C. A.) 12 Q. B. D. 356 ; 53 L. J. Q. B. 249 ; 32 W. R. 607 ; 50 L. T. 441.)

So, too, there is no inexorable rule of practice which precludes the court from granting a new trial on account of the smallness of damages. In *Kelly* v. *Sherlock* (L. R. 1. Q. B. 686, 697 ; 35 L. J. Q. B. 209 ; 12 Jur. N. S. 937), a rule *nisi* was granted on that ground, though it was discharged on the argument. There seems to be no case reported in which a rule for a new trial has been made absolute on this ground in an action of libel ; but in an action of slander a new trial was granted, where the smallness of the amount recovered (1-4*d.*) showed that the jury had made an improper compromise, [*584] instead of deciding the issues submitted to them. (*Falvey* v. *Stanford*, L. R. 10 Q. B. 54 ; 44 L. J. Q. B. 7 ; 23 W. R. 162 ; 31 L. T. 677.) See, however, *Forsdike and wife* v. *Stone* (L. R. 3 C. P. 607 ; 37 L. J. C. P. 301 ; 16 W. R. 976 ; 18 L. T. 722), and *Rendall* v. *Hayward* (5 Bing. N. C. 424), which cases lay down the rule that where there has been no misconduct on the part of the jury, no error in the calculation of figures, and no mistake in law on the part of the judge, a new trial will not be granted. That the jury intended their verdict to carry costs, but have returned an amount insufficient in law to do so, never was a ground for granting a new trial. (*Mears* v. *Griffin*, 1 M. & Gr. 796 ; 2 Scott, N. R. 15 ; *Kilmore* v. *Abdoolah*, 27 L. J. Ex. 307 ; *Forsdike and wife* v. *Stone*, *supra*.)

There is no necessary inconsistency in a jury finding that a libel was written maliciously, and yet awarding only a farthing damages ; and such a verdict will not be set aside. (*Cooke* v. *Brogden & Co.*, 1 Times L. R. 497.)

If a new trial be moved for on the ground of surprise, the absence of a material witness at the trial, &c., there must be an affidavit setting out the facts. "Surprise is a matter extrinsic to the record and the judge's notes, and consequently can only be made to appear by affidavit ; and here we have no affidavit of surprise, in the sense required by the practice of the court." (*Per* Maule, J., in *Hoare* v. *Silverlock* (No. 2), (1850), 9 C. B. 22.)

The judge's note is decisive as to the evidence taken in the court below ; but either party may read a shorthand-writer's note, to supplement, though not to overrule, the judge's note. (*Laming* v. *Gee*, (C. A.) 28 W. R. 217.)

If a new trial be ordered, the costs of the first trial are in the discretion of the judge who tries the case the second time ; if he

makes no order, they follow the event. (*Creen* v. *Wright*, 2 C. P. D. 354 ; 46 L. J. C. P. 427 ; 25 W. R. 502 ; 36 L. T. 355 ; *Field* v. *G. N. Ry. Co.*, 3 Ex. D. 261 ; 26 W. R. 817 ; 39 L. T. 80 ; *Harris* v. *Petherick*, (C. A.) 4 Q. B. D. 611 ; 48 L. J. Q. B. 521 ; 28 W. R. 11 ; 41 L. T. 246.)

County Court Proceedings.

No action of libel or slander can be commenced in the County Court (9 & 20 Vict. c. 95, s. 58), except by consent (19 & 20 Vict. c. 108, s. 23). Whether the word "slander" includes "slander of title" may be doubted. In cases of a trifling nature, it may be desirable that both parties should consent to such a course, especially [*585] if all the witnesses reside in a town where a County Court is held. The parties or their respective solicitors must in that case sign a memorandum of consent, which must be filed ; and thereupon a plaint will be entered and a summons issued, and all further proceedings will be taken as in an ordinary County Court case. (County Court Ord. V. r. 2.)

But an action of libel or slander, whatever the amount of damages claimed, may be transferred to the County Court, under sect. 10 of the 30 and 31 Vict. c. 142, *ante*, p. 526. The defendant may apply to a master at chambers for an order under this section at any stage of the proceedings.

If an order for transfer is made, the plaintiff must lodge the writ and other proceedings, and the order remitting the action, with the registrar of the County Court. Until this is done, the action remains in the Superior Court, which consequently has jurisdiction to vary the order. (*Welply* v. *Buhl*, (C. A.) 3 Q. B. D. 80, 253 ; 47 L. J. Q. B. 151 ; 26 W. R. 300 ; 38 L. T. 115.) If the plaintiff omit to lodge the order of transfer within a reasonable time after it is made, the defendant can apply at chambers for an order dismissing the action for want of prosecution. As soon as the necessary documents are filed, the action becomes a County Court cause, as completely as if it had been duly commenced therein. (*Moody* v. *Steward*, L. R. 6 Ex. 35 ; 40 L. J. Ex. 25 ; 19 W. R. 161 ; 23 L. T. 465.) The County Court judge is bound to assume jurisdiction ; he cannot inquire into the circumstances under which the order was made. (*Blades* v. *Lawrence*, L. R. 9 Q. B. 374 ; 43 L. J. Q. B. 133 ; 22 W. R. 643 ; 30 L. T. 378.)

The plaintiff is required by County Court order XXXIII. r. 1, to lodge with the registrar not only the writ and the order remitting the action, or a duplicate thereof, and a copy or copies of any affidavit or affidavits on which the order was made, but also a statement of the names and addresses of the several parties to the action, and their solicitors, if any, and a concise statement of the particulars of claim, such as would be required upon entering a plaint, signed by the plaintiff or his solicitor ; and the registrar shall thereupon enter the action for trial, and give notice to the parties of the day appointed for such trial, by post or otherwise, ten clear days before such day, and shall annex to the notice to the defendant a copy of

the particulars. For a form of such statement of the plaintiff's particulars, see Precedent No. 88, *post*, p. 670. For a form of the Notice of Trial sent to the defendant by the registrar, see Precedent No. 89, *post*, p. 671. The registrar shall forthwith indorse on the order or duplicate thereof the [* 586] date on which the same was lodged, and file the same, and the action shall proceed in all things as if it were an ordinary action in the County Court. (County Court Ord. XXXIII. r. 2.)

The defendant upon being served with such a notice of trial shall proceed in all things in the same way as if the action had been brought in the County Court, and the notice so served upon him was an ordinary summons. (County Court Ord. XXXIII. r. 3.)

Thus he may, five clear days at least before the day named in such notice of trial, pay money into court, either generally or under Lord Campbell's Act, paying a court fee of 1*s.* in the £ on the amount paid in. (County Court Ord. IX. rr. 11, 12, 13.) Or he may set up a counterclaim (County Court Ord. X. rr. 2, 11), or plead the Statute of Limitations (*ib.* r. 14), or any other special defence, by sending in to the registrar a concise statement of the grounds of such special defence five clear days at least before the day named for trial. (See Precedent, No. 90, *post*, p. 671.) If the defendant omit to send such statement, he will not be allowed to avail himself of the defence, unless the plaintiff consents thereto; but the judge will in a proper case adjourn the trial of the action to enable the defendant to give such notice. (County Court Ord. X. r. 10.) So, too, if the defendant intends to avail himself of the provisions of sects. 1 and 2 of 6 and 7 Vict. c. 96, he must give notice in writing of such intention, signed by himself or his solicitor, to the registrar five clear days before the day appointed for the trial of the action. (County Court Ord. XXXIII. r. 4.) Such notice should be in form No. 91, *post*, p. 672, if under sect. 1 of Lord Campbell's Act; in form No. 92, *post*, p. 672, if under sect. 2. And see County Court Ord. IX. r 13, as to the necessary payment into court.

Where in any action for libel or slander the defendant relies as a defence upon the fact that the libel or slander is true, he shall in his statement set forth that the libel or slander complained of is true in substance. (County Court Ord. X. r 16.) Such statement should be in form No. 90, *post*, p. 671. Where in any action of libel or slander the defendant does not rely as a defence upon the fact that the libel or slander is true, but relies in mitigation of damages on the circumstances under which the libel or slander was published, or the character of the plaintiff, he must in his statement give particulars of the matters relating thereto as to which he intends to give evidence. (*Ib.* r. 17.)

Interrogatories may be administered in the County Court by leave of the registrar. (County Court Ord. XVI. r. 1.) Any objection to answer must be taken in the affidavit in answer. Discovery and [* 587] inspection of documents may also be obtained as in the Superior Court.

The action may at the instance of either party be tried by a jury

of five (9 & 10 Vict. c. 95, s. 73), upon demand being made in writing to the registrar four clear days before trial. (County Court Ord. XXII. r. 1.) In cases where no demand for a jury has been so made, but at the trial both parties desire one, the judge may adjourn the trial upon terms in order that notice for a jury may be given. (County Court Ord. XXII. r. 2.) It is always desirable to have a jury in an action of libel or slander.

The trial takes place in all respects as in an ordinary County Court cause; save that if any pleadings were delivered in the action before the order was made remitting it to the County Court, the judge must not disregard them. Thus, if a plaintiff has shaped his action differently on his statement of claim and on his writ, the judge must look rather to the statement of claim than to the writ (*Johnson* v. *Pulmer*, 4 C. P. D. 258; 27 W. R. 941); for the indorsement on a writ is superseded by a statement of claim, except as to the amount claimed in the action. (*Large* v. *Large*, Weekly Notes, 1877, p. 198; Ord. XX. r. 4.) Great care must be taken to ask the judge before delivering judgment to make a note of any point of law on which either party relies. (*Rhodes* v. *Liverpool Investment Co.*, 4 C. P. D. 425; *Pierpoint* v. *Cartwright*, 5 C. P. D. 139; 28 W. R. 583; 42 L. T. 295; *Seymour* v. *Coulson*, (C. A.) 28 W. R. 664.)

Judgment is entered and all subsequent proceedings taken as in an ordinary County Court action. Any motion for a new trial must be made to the judge in the County Court (County Court Ord. XXXI.); any appeal must be had in accordance with the provisions of the Rules of the Supreme Court, December 1885, made under the Supreme Court of Judicature Act, 1884. (Ord. LIX. rr. 9—17; County Court Ord. XXXII.; and see *R.* v. *Kettle*, *Brown* v. *Dorse* 17 Q. B. D. 761; 55 L. J. Q. B. 470; 34 W. R. 776; 54 L. T. 875.)

The costs will follow the event, unless the judge at the trial make any order to the contrary. County Courts Act, 1846, 9 & 10 Vict. c 95, s. 88.) In taxing the costs incurred in the High Court of Justice previous to the transmission of the action to the County Court under sect. 10 of the County Courts Act, 1867, the registrar shall tax the same according to the scale of costs and fees in use in such High Court of Justice. (County Court Ord. L. r. 1.) The costs subsequent to the order remitting the action will be taxed according to the scale in use in the County Courts, by the express words of sect. 10 of 30 & 31 Vict. c. 142. The Superior Court has no juris-[* 588] diction to make any order as to costs. (*Moody* v. *Steward*, L. R. 6 Ex. 35; 40 L. J. Ex. 25; 19 W. R. 161; 23 L. T. 465.)

Other Inferior Courts.

There are many inferior courts in which actions of libel and slander can be brought, such as the Mayor's Court, London, the Tolzey Court of Bristol, the Salford Hundred Court of Record, the Court of Passage, Liverpool, &c. As to the jurisdiction of such Courts generally, see *ante*, p. 518. The Salford Hundred Court has power to hear all cases of libel or slander arising within the jurisdiction of the court, provided the damages claimed do not exceed £50.

If they exceed £50, it appears that the court has no jurisdiction, even by consent. (9 & 10 Vict. c. cxxvi. ; *Farrow* v. *Hague*, 3 H. & C. 101 ; 33 L. J. Ex. 258.) The costs follow the event, both in the Salford Hundred Court (*Turner* v. *Heyland*, 4 C. P. D. 432 ; 48 L. J. C. P. 535 ; 41 L. T. 556), and in the Liverpool Court of Passage (*King and another* v. *Hawkesworth*, 4 Q. B. D. 371 ; 48 L. J. Q. B. 484 ; 27 W. R. 660 ; 41 L. T. 411), and indeed wherever the case is tried by a jury ; subject, however, to the power reserved to a judge by Ord. LXV. r. 1, to deprive a successful plaintiff of his costs, on good cause shown. Section 29 of the County Courts Act, 1867, never applied to actions of libel or slander, for they never could have been brought in a County Court ; and even where it does apply, it is a question whether it is not now repealed, as it is not expressly re-enacted by sect. 67 of the Judicature Act, 1873.

CHAPTER XX.

[*589] PRACTICE AND EVIDENCE IN CRIMINAL CASES.

This chapter naturally divides itself into two parts :—

I. Proceedings by way of Indictment.

II. Proceedings by way of Criminal Information.

PART I.

PRACTICE AND EVIDENCE IN CRIMINAL PROCEEDINGS BY WAY OF INDICTMENT.

Proceedings before Magistrates.

By sect. 6 of the Newspaper Libel and Registration Act, 1881 (*ante*, p. 386), "every libel or alleged libel" is included in the Vexatious Indictments Act (22 & 23 Vict. c. 17) ; and this section applies to all libels, whether published in a newspaper or not. Hence criminal proceedings for libel now commence by the prosecutor summoning the accused before a police or stipendiary magistrate, or before two justices of the peace. The magistrate may, indeed, if he think fit, on good cause shown and information sworn, issue a warrant for his apprehension in the first instance without any previous summons (*Butt* v. *Conant*, 1 Brod. & B. 548 ; 4 Moore, 195 ; Gow, 84 ; 11 & 12 Vict. c. 42, ss. 1, 8) ; but such a step will seldom be taken on a charge of libel. If the alleged libel appeared in a newspaper, and the defendant be the proprietor, publisher, editor, or any person responsible for its publication, no criminal prosecution can be commenced without the written *fiat* or allowance of the Director of Public Prosecutions in England, or Her Majesty's Attorney-General in Ireland, being first had and obtained. (Sect. 3 of the Newspaper Libel and Registration Act, 1881.) This section does not apply to any criminal information, [* 590] whether *ex officio* or otherwise. (*R.* v. *Yates*, 11 Q. B. D. 750 ; 52 L. J. Q. B. 778 ; 48 J. P. 102; 15 Cox, C. C. 272 ; *Yates* v. *The Queen*, (C. A.) 14 Q. B. D. 648 ; 54 L. J. Q. B. 258 ; 33 W. R. 482 ; 52 L. T. 305 ; 15 Cox, C. C. 686 ; 49 J. P. 436.) The Director of Public Prosecutions has an absolute discretion under this section to grant or withhold his *fiat* as he thinks fit. He will not grant it where a civil action will meet all the requirements of the case. The court has no power to control

his discretion ; no *mandamus* therefore will issue to compel him to grant his *fiat*. (*Ex parte Hubert, Hurter & Son*, 47 J. P. 724 ; 15 Cox, C. C. 166 ; 24 Law Times (newspaper), p. 229.)

If the accused does not appear in answer to the summons, the magistrate may, on proof of due service, go into the case in his absence, but he more usually issues a warrant for the apprehension of the defendant. (11 & 12 Vict. c. 42, ss. 1, 9.)

When the accused comes before the magistrate the prosecutor has merely to prove publication, unless it is not clear that the libel refers to the prosecutor, in which case it may be necessary to call some one acquainted with the circumstances to state that on reading the libel he understood it to refer to the prosecutor. The magistrate must decide for himself whether the written matter before him is in point of law a libel. Unless it is clearly no libel he will, after proof of publication by the defendant or some agent or servant on his behalf (see *ante*, pp. 413, 415), commit the defendant for trial. But, before doing so, he must ask the defendant whether he desires to call any witnesses. (30 & 31 Vict. c. 35 s. 3, Russell Gurney's Act.) The defendant may then call witnesses to prove that he did not publish the libel, that it does not refer to prosecutor, that it is on the face of it a fair and *bonâ fide* comment on certain well-known or admitted facts of public interest, &c.

Upon the hearing of a charge against a proprietor, publisher, or editor, or any person responsible for the publication of a newspaper, for a libel published therein, the court may, by virtue of sect. 4 of the Newspaper Libel and Registration Act, 1881, "receive evidence as to the publication being for the public benefit, and as to the matters charged in the libel being true, and as to the report being fair and accurate and published without malice, and as to any matter which under this or any other act or otherwise might be given in evidence by way of defence by the person charged on his trial or indictment, and the court, if of opinion after hearing such evidence that there is a strong or probable presumption that the jury on the trial would acquit the person charged, may dismiss the case."

But except in cases within this section, the accused may not give [*591] any evidence before the magistrate of the truth of the matters charged in the libel, unless the information charges him with an offence under sect. 4 of Lord Campbell's Act. "The duty and province of the magistrate before whom a person is brought, with a view to his being committed for trial or held to bail, is to determine, on hearing the evidence for the prosecution and that for the defence, if there be any, whether the case is one in which the accused ought to be put upon his trial. It is no part of his province to try the case. That being so, in my opinion, unless there is some further statutory duty imposed on the magistrate, the evidence before him must be confined to the question whether the case is such as ought to be sent for trial, and if he exceeds the limits of that inquiry, he transcends the bounds of his jurisdiction. This case was one of a charge of libel, and the magistrate had to inquire, first, whether the matter complained of was libellous, and, secondly, whether the publication of it was brought home to the accused, so

far as that there ought to be a committal. Independently of statute, the magistrate could not receive evidence of the truth of the libel. The question then arises whether Lord Campbell's Act enables him to do so. In my opinion it does not, because by the provisions of the Act the defence founded upon the truth of the libel does not arise at that stage, and cannot be put forward before the magistrate. Suppose the defendant had succeeded fully and entirely in showing the truth of the libel. What then would have been the duty of the magistrate? He would nevertheless have been bound to send the case for trial, because by the statute the truth of the libel does not constitute a defence until the statutory conditions are complied with, and they cannot be complied with at that stage of the inquiry." (*Per* Cockburn, C.J., in *R.* v. *Sir Robert Carden* (*Labouchere's case*), 5 Q. B. D. 6, 7; 49 L. J. M. C. 1; 28 W. R. 133; 41 L. T. 504; 14 Cox, C. C. 359.) And this decision was followed in *R.* v. *Flowers* (44 J. P. 377); there the defence was that the libel was a fair criticism on a public entertainment, and the magistrate excluded evidence of the facts commented on, and disallowed all cross-examination thereon; and it was held that he was right in so doing. But when the defendant is charged before the magistrate with an offence under the 4th section of Lord Campbell's Act, that is, with maliciously publishing a defamatory libel, *knowing the same to be false*, there is open to the defendant to call evidence of the truth of the libel, so as, if possible, to reduce the charge to the minor offence. (*Ex parte Ellissen* (not reported), approved by Lush, J., in *R.* v. *Carden*, 5 Q. B. D. 11, 13.)

The defendant may himself in every case make a statement before [*592] the magistrates, but it is more prudent for him to say nothing, except in cases where he has himself seen or heard something justifying the libel.

Cases of libel were never disposed of summarily by the magistrate or justices in petty sessions. It is true that there is authority for holding that in some cases of libel, if there is any danger of a breach of the peace, the justices have the power to demand sureties of good behaviour from the libeller, instead of committing him for trial; and may themselves, in default of such sureties, commit him to gaol. (*Haylock* v. *Sparke*, 1 E. & B. 471; 22 L. J. M. C. 67; 16 J. P. 308, 359; 17 J. P. 262, overruling the *dictum* of Lord Camden in *R.* v. *Wilkes*, 2 Wils. 160; and see *R.* v. *Summers*, 1 Lev. 139, and *R.* v. *Shuckburgh*, 1 Wils. 29.) Such power, if any, was never exercised; it was regarded as a violation of the principle of Fox's Libel Act, that libel or no libel is a question for the jury. But now, by sect. 5 of the Newspaper Libel and Registration Act, 1881, "If a court of summary jurisdiction upon the hearing of a charge against a proprietor, publisher, editor, or any person responsible for the publication of a newspaper for a libel published therein is of opinion that though the person charged is shown to have been guilty the libel was of a trivial character, and that the offence may be adequately punished by virtue of the powers of this section, the court shall cause the charge to be reduced into writing and read to the person charged, and then address a question to

him to the following effect :—' Do you desire to be tried by a jury, or do you consent to the case being dealt with summarily?' and, if such person assents to the case being dealt with summarily, the court may summarily convict him and adjudge him to pay a fine not exceeding fifty pounds." Sect. 27 of the Summary Jurisdiction Act, 1879, shall, so far as is consistent with the tenor thereof, apply to every such proceeding. (See note, *ante*, p. 386.)

If the magistrate decide to dismiss the case, the prosecutor may still, under sect. 2 of the Vexatious Indictments Act (22 & 23 Vict. c. 17), which, by sect. 6 of this Act, is made applicable to *every* libel, require the magistrate to bind him over to prosecute, and the magistrate thereupon is bound to take the prosecutor's recognizance and forward the depositions to the court in which the indictment will be preferred. But in that case the prosecutor, if unsuccessful, will have to pay all the defendant's costs. (See 30 & 31 Vict. c. 35, s. 2.)

If the magistrate decide to send the case for trial, the defendant is entitled to be bailed. Reasonable, but not excessive, bail should be demanded, and it is for the justices to determine whether the sureties offered are sufficient. If no sufficient bail can be found, the accused [*593] must be committed to prison ; but if sufficient sureties come forward the magistrates have no discretion but to allow the defendant to be at large on bail.

In the case of an obscene libel the prisoner may be committed for trial to the Quarter Sessions ; in every other case he must be sent to the Assizes or Central Criminal Court. (5 & 6 Vict. c, 38, s. 1.) As to Ireland, see *Re Armstrong*, 9 Cox, C. C. 342.

As to the powers of magistrates, &c., in the case of obscene books and prints, see *ante*, p. 472. In the case of a seditious libel there is no power to issue a search warrant to seize the author's papers. (*Leach's case*, 11 St. Tr. 307 ; 19 Howell's St. Tr. 1002 ; *Entick* v. *Carrington and others*, 11 St. Tr. 317 ; 19 Howell's St. Tr. 1029.)

Indictment.

Counsel must next be instructed to draft the indictment. This requires great care, as the old rules of pleading apply in all their strictness. The words must be set out *verbatim*, however great their length. (*R.* v. *Bradlaugh and Besant*, (C. A.) 3 Q. B. D. 607 ; 48 L. J. M. C. 5 ; 26 W. R. 410 ; 38 L. T. 118.) Any material variation between the words as laid in the indictment and the words proved at the trial will still be fatal, in spite of the powers of amendment given by the 14 & 15 Vict. c. 100, s. 1. (See *Re Crowe*, 3 Cox, C. C. 123 ; *R.* v. *Fussell*, 3 Cox. C.C. 291.)

If the words are in a foreign language, they must be set out in the original, and a correct translation added. (*Zenobio* v. *Axtell*, 6 T. R. 162 ; 3 M. & S. 116 ; *R.* v. *Goldstein*, 3 Brod. & B. 201 ; 7 Moore, 1 ; 10 Price, 88 ; R. & R. C. C. 473.) The indictment must expressly charge the defendant "with publishing ;" as merely writing a libel is no crime. (*R.* v. *Burdett*, 4 B. & Ald. 95.) It must also declare that the libel was written and published "of and concerning"

the prosecutor. The omission of these words was held fatal in *R.* v. *Marsden*, 4 M. & S. 164 ; Russ. on Crimes, 309 ; and in *R.* v. *Sully*, 12 J. P. 536. But if it sufficiently appears from other allegations in the indictment to whom the libel refers, it will be held good. (*Gregory* v. *The Queen*, 15 Q. B. 957 ; 15 Jur. 74 ; 5 Cox, C. C. 247.) The indictment must also aver all facts necessary to explain the meaning of the libel and to connect it with the person defamed ; for sect. 61 of the Common Law Procedure Act, 1852, applies only to pleadings in civil cases, so that in an indictment an innuendo still requires a prefatory averment to support it. Hence there is still [*594] considerable technicality in criminal pleading ; although modern judges will never be quite so strict as their predecessors. (See *ante*, pp. 118, 119.) The innuendo can only explain and point the defamatory meaning of the words ; it must not introduce new matter. The judgment of De Grey, C. J., in *R.* v. *Horne* (1777) (Cowp. 682 ; 11 St. Tr. 264 ; 20 How. St. Tr. 651), "has universally been considered the best and most perfect exposition of the law on this subject." (*Per* Abbott, C. J., in *R.* v *Burdett*, 4 B. & Ald. 316.) Extrinsic facts must be averred where, without such averments, the libel would appear innocent or unmeaning. (*R.* v. *Yates*, 12 Cox, C. C. 233.) But where the writing on the face of it imports a a libel, no innuendo is necessary, nor any introductory averments. (*R.* v. *Tutchin* (1704), 14 How. St. Tr. 1095 ; 5 St. Tr. 527 ; 2 Lord Raym. 1061 ; 1 Salk. 50 ; 6 Mod. 268 ; Holt, 424.) See further as to the office of the innuendo, *ante*, pp. 100—103.

In 1652 Rolle, C. J., laid it down that "in an indictment a thing must be expressed to be done *falso et malitiose*, because that is the usual form." (*Anon.*, Style, 392.) But in *R.* v. *Burks* (7 T. R. 4) the Court of King's Bench decided that in an information, at all events, it is unnecessary to allege that the libellous matter is false. Still it is safer to insert such an averment, "because that is the usual form."

In some few cases it is necessary to aver a special intent. Thus, Abbott, J., held, in *R.* v. *Wegener* (2 Stark. 245), that where a letter is sent direct to the prosecutor, and published to no one else, an intention to provoke the prosecutor and to excite him to a breach of the peace must be alleged, and that an allegation that it was sent with intent to injure, prejudice and aggrieve him in his profession and reputation could not, in such a case, be supported. But the Recorder of London held the contrary in *R.* v. *Brooke* (7 Cox, C. C. 251) ; and in *R.* v. *Price*, tried at the Swansea Assizes on August 9, 1881, Baggallay, L. J., after consulting Pollock, B., decided that the averment of an intention to provoke the prosecutor to a breach of the peace was not essential, the indictment ending as usual with the words "against the peace of our lady the Queen." Still, it will always be safer to insert the words which Abbott, J., thought necessary. Where a letter containing a libel on a married man is sent to his wife "it ought to be alleged as sent with intent to disturb the domestic harmony of of the parties." (2 Stark. 245 ; see also *R.* v. *Benfield*, 2 Burr. 980.) So in the case of a libel on a person deceased, an intent should be alleged to bring contempt and scandal on his

[*595] family and relations, and so provoke them to a breach of the peace (*R.* v. *Topham*, 4 T. R. 126, *ante*, p. 423 ; but now see *R.* v. *Ensor*, 3 Times L. R. 366 ; and Precedent No. 102, *post*, p. 682.)

There is no objection to joining several counts, each for a separate libel, in the same indictment (*per* Lord Ellenborough, in *R.* v. *Jones*, 2 Camp. 132); and the grand jury may of course ignore one count, and find a true bill on any other. Or a count for libel may be joined in the same indictment with a count for any other misdemeanour, though this will not be found convenient in practice, as the judge may call on the prosecutor to elect on which he will proceed (*R.* v. *Murphy*, 8 C. & P. 297); although he will not do so where the counts are all for libel, and for libels appearing at different dates in the same periodical. (15 Cox, C. C. 220.) But counts may not be added for any libels in respect of which the prisoner was not committed for trial, unless the express leave of the judge be obtained under the Vexatious Indictments Amendment Act, 1867 (30 & 31 Vict. c. 35), s. 1. before the bill is presented to the grand jury. The obtaining of such leave is not a mere formality, but must conform to the spirit and intention of that Act ; and the additional counts will be quashed, if leave was granted on insufficient materials. (*R. Pros. Tyler* v. *Bradlaugh and others*, 31 W. R. 229 ; 47 L. T. 477 ; 47 J. P. 71 ; 15 Cox, C. C. 156.) And now since the Newspaper Libel and Registration Act, 1881, sect. 6, it is no longer in the power of the prosecutor when the magistrate has only committed the defendant under sect. 5 or for the common law offence, to add a count under sect. 4 of of Lord Campbell's Act (as it was formerly ; see 5 Q. B. D. p. 12 ; *Boaler* v. *Holder*, 54 L. T. 298). The count for the graver offence will now be quashed or amended so as to make the indictment correspond with the committal. (*R.* v. *Felbermann and Wilkinson*, 51 J. P. 168 ; *Boaler* v. *Holder*, 3 Times L. R. 546 ; 51 J. P. 277.)

All who are in any way concerned in the composition or publication of a libel may be joined in the same indictment. For by the 24 & 25 Vict. c. 94, s. 8, "whosoever shall aid, abet, counsel or procure the commission of any misdemeanour, whether indictable at common law or by virtue of any statute, may be tried, indicted, and punished as a principal offender." But if one defendant denies that he is in any way connected with the libel, and desires to call his co-defendants as witnesses in support of his case, the judge will order him to be tried separately from the others, unless such separate trial would embarrass the prosecution more than a joint trial would prejudice the defendant. It is a question of the balance of convenience. (*Per* Lord Coleridge, in *R.* v. *Bradlaugh and others*, 15 Cox. C. C. 207, 220.)

[*596] *Pleading to the Indictment.*

When a true bill has been found by the grand jury, the defendant is arraigned, the substance of the indictment is read over to him, and he is then called on to plead. At common law he might—

(1) Demur to the indictment ;

(2) Plead to the jurisdiction of the court ;
(3) Plead especially in bar—
(*a*) Autrefois acquit ;
(*b*) Autrefois convict (see *post*, p. 606) ;
(*c*) Pardon ;
(4) Plead guilty ; or
(5) Plead the general issue—not Guilty (see *ante*, 534).

If the prisoner stands mute of malice, or does not answer directly to the charge, a plea of Not Guilty shall be entered for him, and the trial shall proceed as though he had actually pleaded the same. (7 & 8 Geo. IV. c. 28, s. 2.)

By virtue of 6 & 7 Vict. c. 96, s. 6, he may now also—

(6) Plead a justification that the words are true and that it was for the public benefit that they should be published. (See *ante*, p. 437.) This plea may be pleaded with Not Guilty ; it must be entered and filed at the Crown Office or with the Clerk of Assize, and a copy delivered to the prosecutor.

There is now but little use in demurring to an indictment, except where the words are not clearly libellous in themselves, and are not reasonably susceptible of the meaning ascribed to them by the innuendo. In such a case it might be well to put an end to the case as quickly as possible. But if the demurrer be for a mere formal defect, the court has power to amend, after the demurrer, either an information (*R.* v. *Wilkes*, 4 Burr. 2568 ; *R.* v. *Holland*, 4 T. R. 457), or now even an indictment. (14 & 15 Vict. c. 100, ss. 1, 2, 3, 25.) If, on the other hand, the defect is one of substance, it will not be waived by pleading over, nor will it be cured by verdict ; but the defendant may still bring error, or move an arrest of judgment after conviction. (See 14 & 15 Vict. c. 100, c. 25.) Moreover there is this danger in demurring, that the defendant may not demur and plead Not Guilty at the same time (*R.* v. *Odgers*, 2 Moo. & Rob. 479); hence, in strict law, if he fail on his demurrer, final judgment will be entered for the Crown on the whole case. (*R.* v. *Taylor*, 3 B. & C. 509, 515 ; 5 D. & R. 422.) But the court has power to permit the defendant afterwards to plead over, and in these more merciful days will generally exercise that power. [*597] *R.* v. *Mitchell*, 3 Cox, C. C. 93 ; *R.* v. *Birmingham & Gloucester Railway Co.*, 3 Q. B. 223, 233 ; 10 L. J. M. C. 136.)

The plea of Not Guilty puts the prosecutor to proof of every material allegation in the indictment. The defendant may show under this plea that the libel was a fair and *bonâ fide* comment on a matter of public interest, that the occasion of publication was privileged and may indeed raise every other defence permitted him by law, except that the libel is true.

It is only in the case of a defamatory libel on a private individual that the defendant may justify under Lord Campbell's Act. (*Ante*, p. 438.) And he does so at his peril ; for placing such a plea on the record will be deemed an aggravation of his offence, should he fail to prove it. By the express words of Lord Campbell's Act, a plea of justification under sect. 6 shall be pleaded "in the manner now required in pleading a justification to an action for defamation," as

to which see *ante*, pp. 177, 538. But in spite of these words there is no power in any court to order particulars of such a plea to an indictment or information, or to strike it out. (*Re Rea*, 9 Cox, C. C. 401.) If sufficient details be not given in the plea, the only course is for the prosecutor to demur. (*R.* v. *Hoggan*, Times for Nov. 4th, 1880.) To such a plea the prosecutor may reply generally, denying the whole thereof. (See precedents of such plea and reply in Appendix A., Nos. 38, 39, 40.) The other pleas mentioned above are now of rare occurrence. (See *post*, p. 686.)

Certiorari.

An application is frequently made to the Queen's Bench Division for a writ of *certiorari* to bring up an indictment for libel from an inferior court that it may be tried in a Superior Court. The application is frequently made before the indictment is found by the grand jury, the court being asked to remove "any indictment which may be found." In no other way can the court change the venue in a criminal case. (*R.* v. *Casey*, 13 Cox, C. C. 614; *R.* v. *Hon. F. Cavendish*, 2 Cox, C. C. 175.) The advantages obtained by the removal are amongst others, that in the Queen's Bench Division a special jury can be secured, and that the defendant can move the court for a new trial, if convicted.

Where the application is made by the Attorney-General officially, the writ issues as a matter of course. (*R.* v. *Thomas*, 4 M. & S. 442.) But where a private individual applies for the writ, whether prosecutor or defendant, he will have to file affidavits showing some special ground for the removal, arising out of the circumstances of the par[*598] ticular case (Crown Office Rules, 1886, 29); and he must also enter into recognizances to pay all costs incurred subsequent to the removal, if he be ultimately unsuccessful. (16 & 17 Vict. c. 30, ss. 4, 5.) The application may in vacation be made to a judge at chambers. (5 & 6 Will. & Mary, c. rr. s. 3; Crown Office Rules, 1886, 42.)

One of several defendants may obtain the writ; if he does, this will remove the indictment as to all. (*R.* v. *Boxall*, 4 A. & E. 513.) But the judge who grants the *certiorari* will require the defendant who applies for it to give security for the costs of the prosecution occasioned by the removal, in the event of any one of the defendants being convicted. (*R.* v. *Jewell*, 7 E. & B. 140; 26 L. J. Q. B. 177; *R.* v. *Foulkes*, 1 L. M. & P. 720; 20 L. J. M. C. 196.)

The affidavits should be entitled "in the Queen's Bench Division" simply. The mere fact that the defendant desires a special jury is not alone a sufficient ground for removal. (*R.* v. *Morton*, 1 Dowl. N. S. 543.) Nor is it enough to show on affidavit that difficult questions of law may arise (*R.* v. *Joule*, 5 A. & E. 539), especially if the indictment be in the Central Criminal Court. (*R.* v. *Templar*, 1 Nev. & P. 91.) But if it can be proved that a fair and impartial trial of the case cannot be had in the court below, the application will be readily granted. (*R.* v. *Hunt and others*, 3 B. & Ald. 444; *R.* v. *Palmer*, 5 E. & B. 1024.) No appeal lies to the Court

of Appeal from the Refusal of the Queen's Bench Division to grant a *certiorari*. (*R.* v. *Rudge*, (C. A.) 16 Q. B. D. 459 ; 55 L. J. M. C. 112 ; 34 W. R. 207 ; 53 L. T. 851 ; 50 J. P. 755.)

Formerly in cases of misdemeanour the court made the order absolute in the first instance. (*R.* v. *Spencer*, 8 Dowl. 127 ; *R.* v. *Chipping Sodbury*, N. & M. 104.) But now in all cases an order *nisi* only is granted, unless there be great urgency. (See Crown Office Rules, 1886, 28.) If an order *nisi* for such a writ be obtained, the court below will, as of course, order the trial to stand over till the argument. If the order be made absolute, either prosecutor or defendant can apply for a special jury. (6 Geo. IV. c. 50, s. 30.) After the removal the defendant must appear in the Queen's Bench Division, and plead or demur to the indictment within four days, if not immediately ; but the court will grant him further time on good cause shown. (60 Geo. III. & 1 Geo. IV. c. 4, ss. 1, 2.)

The trial may take place, either at bar in the Queen's Bench Division at the Royal Courts of Justice, or at the assizes on the civil side, or at the Central Criminal Court. (19 & 20 Vict. c. 16, s. 1.) A successful prosecutor will be entitled to his costs, whether he be "the party grieved or injured" by the defendant's words or not. [*599] (*R.* v. *Oastler*, L. R. 9 Q. B. 131 ; 42 L. J. Q. B. 42; 22 W. R. 490;29 L. T. 830 ; overruling *R.* v. *Dewhurst*, 5 B. & Ad. 405.) The costs will be taxed under a side-bar rule ; and if they are not paid within ten days the recognizance will be estreated, and the sureties compelled to pay. (16 & 17 Vict. c. 30, s. 6.) The sureties may then sue the defendant and recover the amount for which they became bail in an action for money paid at the defendant's request. (*Jones* v. *Orchard*, 16 C. B. 614 ; 24 L. J. C. P. 229 ; 3 W. R. 554.)

A writ of *certiorari* may also be applied for to bring up an indictment in order that its validity may be considered and determined, and that it may be quashed, if proved invalid. Such an application must be made after the bill is found and before judgment has been given thereon ; for after judgment has been given the record can only be removed by writ of error. (*R.* v. *Seton*, 7 T. R. 373 ; *In re Pratt*, 7 A. & E. 27 ; *R.* v. *Unwin*, 7 Dowl. 578 ; *R.* v. *Christian*, 12 L. J. M. C. 26 ; *R.* v. *Wilson*, 14 L. J. M. C. 3.) The court below has full power to hear a motion in arrest of judgment.

Evidence for the Prosecution.

When the case comes on for trial the *onus* lies on the prosecutor to prove—

(1.) That the defendant published the defamatory words. As to what is a sufficient publication in law, see *ante*, c. VI. pp. 151—169. As to constructive publication by the act of the defendant's servant or agent, see *ante*, pp. 411—413. The proof of publication in criminal cases is precisely the same as in civil cases, save that it is not essential to prove a publication to a third person, where the indictment alleges an intent to provoke a breach of the peace. (*R.* v. *Wegener*, 2 Stark. 245 ; *Phillips* v. *Jansen*, 2 Esp. 624 ; *Clutterbuck* v. *Chaffers*, 1 Stark. 471.) Sect. 27 of the Common Law Pro-

cedure Act, 1854, *ante*, p. 560, as to comparison of handwriting, though originally confined to civil proceedings (sect. 103), now applies to criminal trials as well. (28 & 29 Vict. c. 18, s. 8. See also *R.* v. *Beare*, 1 Lord Raym. 414 ; 12 Mod. 221 ; 2 Salk. 417 ; Carth. 409 ; Holt, 422 ; *R.* v. *Slaney*, 5 C. & P. 213.) Whoever requests or procures another to write or publish a libel will be held equally guilty with the actual publisher. (*R.* v. *Cooper*, 8 Q. B. 533 ; 15 L. J. Q. B. 206.) If the manuscript from which a libel has been printed be produced and proved to be in the handwriting of the defendant, this is *primâ facie* proof that he authorised or directed the printing and publishing ; though the defendant may give evidence to rebut it. (*R.* v. *Lovett*, 9 [*600] C. & P. 462. And see the remarks of Lord Erskine, 5 Dow. H. L., at p. 201.)

(2.) It is, however, necessary in a criminal case to prove further that the prisoner published the libel in the county in which the venue is laid. However, if the defendant write a libellous letter and cause it to be posted, that letter is published both in the county where it is posted, and in the county to which it is addressed. (*R.* v. *Burdett*, 4 B. & Ald. 95 ; *R.* v. *Girdwood*, 1 Leach, 169 ; East, P. C. 1120, 1125 ; *R.* v. *Holmes*, 12 Q. B. D. 23 ; 49 L. T. 540.) If the person to whom it is addressed be not then at the address given on the envelope, and the letter be forwarded unopened to him at his lodgings in Middlesex, and there opened, then this is a publication by the defendant in Middlesex. (*R.* v. *Watson*, 1 Camp. 215.) The post-mark is sufficient *primâ facie* evidence that the letter was in the post-office named on the date of the mark. (*R.* v. *Plumer*, Russ. & Ry. 164 ; *R.* v. *Canning*, 19 St. Tr. 370 ; *R.* v. *Hon. Robert Johnson*, 7 East, 65 ; 3 Smith. 94 ; 29 How. St. Tr. 103 ; *Stocken* v. *Collin*, 7 M. & W. 515 ; 10 L. J. Ex. 227.) These cases must be taken to overrule the *dictum* of Lord Ellenborough in *R.* v. *Watson*, 1 Camp. 215. An admission by the defendant that he wrote the libel is no admission that he published it, still less that he published it in any particular county. (*The Seven Bishops' case*, 4 St. Tr. 304 ; *R.* v. *Burdett*, 4 B. & Ald. 95.)

(3.) The prosecutor must now put in the libel and have it read to the jury. The libel itself must, if possible, be produced at the trial. If it be in the possession of the defendant, and notice has been given to him to produce it, and he refuses so to do, secondary evidence may be given of its contents. (*Attorney-General* v. *Le Merchant*, 2 T. R. 201, n. ; *R.* v. *Boucher*, 1 F. & F. 486.) But proof that the document was last seen in the possession of a servant of the defendant does not of itself entitle the prosecutor to give parol evidence of its contents. (*R.* v. *Pearce*, Peake, 75.) Notice to produce must be given a reasonable time before the trial. No general rule can be laid down as to what is a reasonable time ; each case must be governed by its particular circumstances ; but if it appear that since the notice was given there was an opportunity of fetching the document, the notice will be held sufficient. (*Per* Bramwell, B., in *R.* v. *Barker*, 1 F. & F. 326.) Any other documents which explain the libel, and are referred to in it, may also be put in and read. (*R.* v. *Slaney*, 5 C. & P. 213.)

Any variance between the words as proved and the words as laid will be fatal, if it in any way affects the sense. But a variance which is immaterial to the merits of the case may be amended by the judge [*601) at the trial, at any time before verdict, if he thinks that such amendment cannot prejudice the defendant in his defence on the merits. (7 Geo. IV. c. 64, s. 20; 14 & 15 Vict. c. 100, ss. 1, 24, 25.) But once such amendment has been made, there is no power of amending the amendment, or reverting to the indictment as it originally stood; but the case must be decided upon the indictment in its amended form.

The prosecution must further prove the innuendoes and all explanatory averments of extrinsic facts, whenever such proof is necessary to bring out the libellous nature of the publication, or to point its application to the person defamed. That asterisks or blanks are left where the name of the person defamed should appear is no defence, if those who knew the circumstances understood the libel to refer to the prosecutor. Any declarations of the defendant as to what he meant are admissible in evidence against him. (*R.* v. *Tucker*, Ry. & Moo. 134.) Strict proof must be given of all material and necessary allegations in the indictment, which the libel itself does not admit to be true. (*R.* v. *Sutton*, 4 M. & S. 548; *R.* v. *Holt*, 5 T. R. 436; *R.* v. *Martin*, 2 Camp. 100; *R.* v. *Budd*, 5 Esp. 230.)

It will then be for the jury, after considering this evidence, to say whether the publication, when taken as a whole, is or is not a libel.

(4) In a few cases the prosecution must also prove a special intent stated in the indictment. (*Ante*, pp. 423, 594.) Whether such special intent existed or no is a question for the jury. An averment of intention is divisible; so that where a libel is alleged to have been published with intent to defame certain magistrates, and also to bring the administration of justice into contempt, it is sufficient to prove a publication with either of these intentions. (*R.* v. *Evans*, 3 Stark. 35.) Malice need never be proved unless the occasion be privileged.

(5.) If the indictment be framed under sect. 4 of Lord Campbell's Act, the prosecutor must give some evidence that the defendant *knew* that the words were false. But in no other case need the prosecutor give any evidence to show that the libel is false.

Evidence for the Defence.

The defendant may call evidence rebutting the case for the prosecution, *e.g.*, he may dispute the fact of publication, or negative the innuendo, or show that the libel referred to some one else, not the prosecutor. He may give in evidence any facts which put a different complexion on the libel, *e.g.*, other passages contained in the same publication, fairly connected with the same subject. (*R.* v. *Lambert* [*602] *and Perry*, 2 Camp. 398; 31 How. St. Tr. 340.) So, too, the defendant may give evidence of any collateral facts which show that the libel complained of is a fair and *bonâ fide*

comment on a matter of public interest, or is privileged by reason of the occasion on which it was published. Unless such privilege be absolute, the prosecutor may rebut this defence by evidence of malice, precisely as in civil cases. (*Ante*, c. IX. pp. 269—290.)

The defendant may also cross-examine the plaintiff's witnesses as to any previous statements made by them on the subject-matter of the indictment, and if such statements were reduced into writing, such writing may be produced to contradict them. (28 & 29 Vict. c. 18, ss. 4, 5.) As to proving a previous conviction of a witness, see *ante*, p. 573.

The defendant may call evidence to show that though he published the libel with his own hand he was not at the time conscious of its contents. The *onus* of proving this lies on the defendant; the bare delivery of the letter, though sealed, has been held to be *primâ facie* evidence of a knowledge of its contents. (*R.* v. *Girdwood*, 1 Leach, 169; East, P. C. 1120, 1125.) But if the defendant can prove that he cannot read, or that he never had any opportunity of reading the libel, but delivered it pursuant to orders, having no reason to suppose its contents illegal, this will be a defence. (See *ante*, pp. 432, 433.)

Again, where evidence has been given which has established a *primâ facie* case of publication against the defendant by the act of some other person acting by his authority, the defendant may prove that such publication was made without his authority, consent or knowledge, and arose from no want of due care or caution on his part. (6 & 7 Vict. c. 96, s. 7.) The leading case on this section is *R.* v. *Holbrook and others*, 3 Q. B. D. 60; 47 L. J. Q. B. 35; 26 W. R. 144; 37 L. T. 530; 13 Cox, C. C. 650; 4 Q. B. D. 42; 48 L. J. Q. B. 113; 27 W. R. 313; 39 L. T. 536; 14 Cox, C. C. 185, *ante*, p. 415. Mr. Bradlaugh succeeded in establishing a defence under this section in *R.* v. *Bradlaugh and others*, 15 Cox, C. C. 217, *ante*, p. 436.

Also, if the defendant has pleaded a plea under Lord Campbell's Act, but not otherwise, he may give evidence of the truth of the libel. But the truth alone is no defence in a criminal case, unless the defendant can also show that it was for the public benefit that the matters charged should be published. No such plea can be pleaded in the case of a blasphemous, obscene or seditious libel. (*R.* v. *Duffy*, 9 Ir. L. R. 329; 2 Cox, C. C. 45; *Ex parte O'Brien*, 12 L. R. Ir. 29; 15 Cox, C. C. 180.) If a general charge be made in the libel, [*603] specific instances must be set out in the plea. It will be sufficient, however, if at the trial two or three distinct instances are proved to the satisfaction of the jury. (*R. pros Lambri* v. *Labouchere*, 14 Cox, C. C. 419; *ante*, p. 174.)

Evidence that the identical charges contained in the libel which is the subject of the indictment had, before the time of composing and publishing such libel, appeared in another publication which was brought to the prosecutor's knowledge, and against the publisher of which he took no legal proceedings, is not admissible either at common law or under this section. (*R.* v. *Holt*, 5 T. R. 436; *R.* v. *Newman*, Dears. C. C. 85; 3 C. & K. 252; 1 E. & B. 268;

22 L. J. Q. B. 156 ; 17 Jur. 617 ; *Pankhurst* v. *Hamilton*, 2 Times L. R. 682.) That rumours to the same effect had previously been circulated in other newspapers is no justification for the defendant's repeating the statement in his own paper, especially if he purports to speak from authority. (*R.* v. *Harvey and Chapman*, 2 B. & C. 257.) So, too, it is no defence to a charge of publishing a seditious libel, that it is an extract from an American paper, reprinted as foreign news, especially if such seditious extracts be habitually published by the defendant at a time of great political excitement, without one word of warning or one note of disapproval. (*R.* v. *Pigott*, 11 Cox, C. C. 46.) Where the libel contains several charges, the defendant must prove the truth of them all ; otherwise the jury will be bound to find a verdict for the Crown ; and the court, in giving judgment, must consider whether the guilt of the defendant is aggravated or mitigated by the plea, and by the evidence given to prove or disprove it, and form its own conclusion on the whole case. (*R.* v. *Newman*, 1 E. & B. 558 ; 22 L. J. Q. B. 156.)

If no such plea has been placed on the record, no evidence can be given of the truth of the defendant's words. But if evidence be admissible on other issues in the case, it will not be excluded merely because it tends to show the truth of the libel. (*R.* v. *Grant and others*, 5 B. & Adol. 1081 ; 3 N. & M. 106.)

The defendant may also, as in other criminal cases, call witnesses to his good character ; but such evidence will be of very little use, except perhaps in cases of mistaken identity. Evidence in mitigation of punishment is not generally given before verdict ; but affidavits may be filed for that purpose after the trial. Some judges permit the prisoner, although defended by counsel, to make a statement to the jury before his counsel addresses them. But if in such statement the prisoner gives evidence, the counsel for the prosecution can claim the right to reply generally, after the counsel for the prisoner [*604] has concluded his speech. (*R.* v. *Eyre* (Leeds Assizes), Times, Nov. 6th, 1880.)

Summing-up and Verdict.

The judge at the conclusion of the case sums up the evidence to the jury, and directs the jury as to the law. Before Fox's Libel Act, it had come to be the rule that the judge, not the jury, should decide whether or no the publication was a libel. On proof of the publication of the innuendoes, and of the other necessary averments, the judge would direct the jury to find the defendant guilty. (See *R.* v. *Woodfall*, 5 Burr. 2661 ; *R.* v. *Shipley* (*Dean of St. Asaph*), 21 St. Tr. 1043 ; 3 T. R. 428, n. ; 4 Dougl. 73 ; *R.* v. *Withers*, 3 T. R. 428.) But that Act (32 Geo. III. c. 60, s. 1), declares and enacts that on the trial of an indictment or information for libel the jury may give a general verdict of guilty or not guilty upon the whole matter put in issue before them. Or the jury may in their discretion find a special verdict as in other criminal cases. (Sect. 3.) The judge of course may still direct the jury on any point of law, stating his own opinion thereon if he think fit ; but the question, libel or

no libel, must ultimately be decided by the jury. Fitzgerald, J., thus addressed the jury in a case of seditious libel:—"You are the sole judges of the guilt or innocence of the defendant. The judges are here to give any help they can, but the jury are the judges of law and fact, and on them rests the whole responsibility. In this sense the jury are the true guardians of the liberty of the press." (*R.* v. *Sullivan*, 11 Cox, C. C. 52.) The jury should of course pay attention to and accept the judge's statement of the law, and then take the alleged libel into their hands, and consider it carefully; not dwelling too much on isolated passages, but judging it fairly as a whole. If the libel be contained in a book they may look at the rest of the book. (*Per* Lord Ellenborough, in *R.* v. *Lambert and Perry*, 2 Camp. 399. See also *Cooke* v. *Hughes*, 1 R. & M. 112, and *ante*, pp. 98, 317.) And on the trial of *Horne Tooke* for treason the matter was carried much further, for in that case the prisoner was allowed to read in his defence various extracts from other works published by him at a former period of his life; and the jury were permitted to carry these along with them when they retired to consider their verdict. Lord Ellenborough, however, expressed grave doubt as to the propriety of this course. (2 Camp. 400.)

[*605] *Proceedings after Verdict.*

If at the trial the defendant is acquitted, no further proceedings can be taken; the verdict of the jury is conclusive in favour of the defendant. (*R.* v. *Cohen and Jacob*, 1 Stark. 516; *R.* v. *Mann*, 4 M. & S. 337.) If the jury cannot agree they must be discharged and the prisoner tried again, unless a *nolle prosequi* be entered, for which the leave of the Attorney-General is necessary. The prisoner is apparently not entitled to be admitted to bail in the interval between the two trials. (*R.* v. *Foote*, 10 Q. B. D. 378; 48 L. T. 394; 15 Cox, C. C. 240.)

If, however, the defendant is convicted, then, if the judge before whom the trial took place has reserved any point of law arising thereat for the consideration of the court above, he may state a case in the matter pointed out by the 11 and 12 Vict. c. 78, s. 2. This case will be argued in the court for the consideration of Crown Cases Reserved, when the conviction will be either quashed or affirmed. If no such point has been reserved, then the prisoner may move in arrest of judgment, as in a civil case under the old procedure, on the ground that the words as laid do not sufficiently appear to be libellous, or on some other ground appearing on the face of the record. Power to make this motion is expressly reserved by Fox's Libel Act (32 Geo. III. c. 60, s. 4). The absence of any essential introductory averment or innuendo will be a good ground for arresting judgment. (*R.* v. *Shipley* (*Dean of St. Asaph*), 21 St. Tr. 1043; 3 T. R. 428, n.; 4 Dougl. 73; *R.* v. *Topham*, 4 T. R. 126.) But mere formal defects cannot now be taken advantage of in such a motion. (14 & 15 Vict. c. 100, s. 25.) And "it is a general rule of pleading at common law that where an averment which is necessary for the support of the pleadings is im-

perfectly stated, and the verdict on an issue involving that averment is found, if it appears to the court, after verdict, that the verdict could not have been found on this issue without proof of this averment, then, after verdict, the defective averment which might have been bad on demurrer is cured by the verdict." (*Per* Blackburn, J., in *Heyman* v. *The Queen*, L. R. 8 Q. B. 105, 106; 21 W. R. 357; 28 L. T. 162; *per* Brett, L. J., in *R.* v. *Aspinall*, 2 Q. B. D. 57, 58; 46 L. J. M. C. 145; 25 W. R. 283; 36 L. T. 297. See also Serjeant Williams' note (1) to *Stennel* v. *Hogg*, 1 Wms. Saund. 228; *R.* v. *Goldsmith*, L. R. 2 C. C. R. 79; 42 L. J. M. C. 94; 21 W. R. 791; 28 L. T. 881.) In all other cases, however, every objection which could have been taken by demurrer before the jury were sworn may still be taken either upon motion in arrest of judgment or by [*606] writ of error. (*Per* Cockburn, C. J., 2 Q. B. D. 572; and *per* Bramwell, L. J., 3 Q. B. D. 624; *R.* v. *Larkin*, Dears. C. C. 365; 23 L. J. M. C. 125.) Hence, if an indictment for publishing an obscene book does not set out the passage or passages of such book alleged to constitute the offence, but only refers to the book by its title, this defect is not cured by a verdict convicting the defendant, nor is it waived by the defendant's omitting to demur. (*Bradlaugh and Besant* v. *The Queen* (C. A.), 3 Q. B. D. 607; 48 L. J. M. C. 5; 26 W. R. 410; 38 L. T. 118; 14 Cox, C. C. 68, overruling *R.* v. *Bradlaugh and Besant*, 2 Q. B. D. 569; 46 L. J. M. C. 286.) Where, however, an indictment or information contains several counts, if any one of them be found good, the judgment will stand. (*R.* v. *Benfield and others*, 2 Burr, 985.)

A motion in arrest of judgment should be made before sentence to the judge at the trial, who may reserve the point for the consideration of the Court of Crown Cases Reserved. If the defendant omit to make such motion, still the court will of itself arrest the judgment, if on a review of the case it be satisfied that the defendant has not been found guilty of any offence in law. (*Per cur.* in *R.* v. *Waddington*, 1 East, 146.) On a motion in arrest of judgment the court has no power to amend the record. (*R.* v. *Larkin*, Dears. C. C. 365; 23 L. J. M. C. 125.) If the judgment be arrested, all the proceedings are set aside and judgment of acquittal is given; but this will be no bar to a fresh indictment, for the defendant was never really in jeopardy under the defective indictment. (*Vaux's case*, 4 Rep. 45a.) So if the judgment against him be reversed on a writ of error, he can be again indicted for the same offence. (*R.* v. *Drury and others*, 3 C. & K. 190; 18 L. J. M. C. 189.)

The defendant may also bring a writ of error, after conviction and sentence, on obtaining the *fiat* of the Attorney-General, which will be granted on a certificate signed by the prisoner's counsel whenever reasonable grounds are shown. That the same point has been raised by motion in arrest of judgment and decided against the prisoner is no bar to bringing error. (*Per* Mellor, J., in *R.* v. *Bradlaugh and Besant*, 2 Q. B. D. 574; 46 L. J. M. C. 286.) If the Attorney-General refuse to grant a *fiat*, the defendant has no remedy. (*Ex parte Newton*, 4 E. & B. 869; *Re Pigott*, 11 Cox, C.

C. 311.) If the judgment below be reversed, the Court of Error now has power to pronounce the proper judgment. (11 & 12 Vict. c. 78, s. 5.)

When the indictment or information either originated in the Queen's Bench Division or has been removed thither by *certiorari*, the defendant may also move for a new trial, as in a civil case under [*607] the old practice. The motion should be made within the times specified in r. 166 of the Crown Office Rules, 1886; though the time may be extended *ex gratiâ* in a proper case. (*R.* v. *Holt*, 5 T. R. 436; *R.* v. *Newman*, 1 E. & B. 270; 22 L. J. Q. B. 156; Dears. C. C. 85; 17 Jur. 617; 3 C. & K. 252; Crown Office Rules, 167.)

A new trial may be moved for on the ground that the prosecutor omitted to give due notice of trial, or that the verdict was contrary to evidence or to the direction of the judge, or on the ground of improper reception or rejection of evidence or other mistake or misdirection of the judge, or of any gross misbehaviour of the jury among themselves, or for surprise, or for any other cause where it shall appear to the court that a new trial will further the ends of justice. (*R.* v. *Whitehouse and Tench*, Dears. C. C. 1.)

The prisoner *must* be present in court when a motion for a new trial is made and argued. (*R. Spragg and another*, 2 Burrt 929; *R.* v. *Caudwell*, 2 Den. C. C. 372, n; Crown Office Rules, 169.) The rule is generally argued therefore when the defendant is brought up for judgment. (*R.* v. *Hetherington*, 5 Jur. 529.)

Where the verdict is on the face of it imperfect, so that judgment cannot be given upon it, the court will award a *venire de nova* instead of granting a new trial, the error appearing on the face of the record. In such a case the first trial is a mis-trial and is treated as a nullity, and the prisoner does not plead again. (*Per* Abbott, C. J., in *R.* v. *Fowler and Sexton*, 4 B. & Ald. 273, 276.) A *venire de nova* was awarded in *Woodfall's case* (5 Burr, 2661), it being impossible to say what the jury meant by finding him "guilty of publishing *only*." (And see *Campbell and another* v. *The Queen*, 11 Q. B. 799; 17 L. J. M. C. 89.)

When a motion for a new trial is allowed, or a writ of *venire facias de nova* awarded, the parties stand precisely as they did before the first trial, and the whole of the evidence has to be reheard.

Where a new trial is ordered of an indictment removed into the Queen's Bench Division by *certiorari*, at the instance of the defendant, the court may, in its discretion, order that the costs shall abide the event of the new trial. (*R.* v. *Whitehouse and Tench*, Dears. C. C. 1.)

Sentence.

Sentence is generally passed directly the verdict of guilty is given; but not always, especially in the Queen's Bench Division. If not, the defendant was formerly kept in custody till sentenced; but now, unless the case be exceptional, he is allowed out on the same bail as [*608] before. In the interval, the defendant frequently files

affidavits in mitigation of punishment, which the prosecutor may answer. Such affidavits may show that the defendant reasonably and *bonâ fide* believed in the truth of the charges made in the libel, but not that the libel is in fact true. (*R.* v. *Burdett*, 4 B. & Ald. 314 ; *R.* v. *Halpin*, 9 B. & C. 65 ; 4 M. & R. 8 ; *R.* v. *Newman*, 17 J. P. 84.). Or they may contain general evidence of a good character, or disclaim any personal malice against the relator (*R.* v. *Tunfield*, 42, J. P. 423), or show that the defendant voluntarily stopped the sale of the book complained of as soon as proceedings were commenced (*R.* v. *Williams*, Lofft. 759), or any other circumstance showing provocation by the prosecutor or an absence of malice in the defendant. But the defendant should be careful not to attack the character of the prosecutor, or his witnesses, or impugn the justice of the verdict, lest he thereby aggravate his original offence. A memorial in his favour, not on affidavit, will not be received. (*Per* Blackburn, J., in *R.* v. *Shimmens*, 34, J. P. 308.)

If, in the interval, since the verdict, the defendant has republished the libel, or continued its sale, or been guilty of other misconduct, the prosecutor may file affidavits in aggravation of punishment. (See *R.* v. *Withers*, 3 T. R. 428.) As to the procedure when the defendant is brought up for judgment see *R.* v *Bunts*, 2 T. R. 683. The defendant must be personally present, if his state of health will permit. (*R.* v *Ryder-Burton*, 38 J. P. 758 ; *R.* v. *Kinglake*, W. Notes, 1870, p. 130.) If he has absconded, judgment apparently cannot be pronounced ; all the court can do is to entreat the recognizances. (*R.* v. *Chichester*, 17 Q. B. 504, n ; *R.* v. *Elizabeth Williams* Weekly Notes, 1870, p. 120) The judge in passing sentence will consider whether the guilt of the defendant is aggravated or mitigated by any plea of justification which he may have placed on the record, and by the evidence given to prove or disprove the same. (6 & 7 Vict. c. 96, s. 6 ; *R.* v. *Newman*, 17 J. P. 84.)

Where judgment has been suffered by default, both parties should state their case on affidavit. If there is any matter in the prosecutor's affidavit which the defendant could not be expected to have come prepared to answer, he will be allowed an opportunity of answering it on a future day. (*R.* v. *Archer*, 2 T. R. 203, n ; *R.* v. *Wilson*, 4 T. R. 487.)

As to the sentence that may be passed in the case of a defamatory libel at common law, se *ante*, p. 425 ; under the various statutes, pp. 426, 427 ; in the case of a blasphemous libel, p. 440 ; an obscene libel, p. 471 ; a seditious libel, p. 479. If the prisoner be found [*609] guilty of publishing a blasphemous or seditious libel, all copies found in his possession may be seized and destroyed by an order of the court, under 60 Geo. III. & 1 Geo. IV. c. 8, ss. 1, 2.

Costs.

In the case of an indictment or information by a private prosecutor the publication of a defamatory libel, if judgment shall be given for the defendant, he shall be entitled to recover his costs from the prosecutor. (6 & 7 Vict. c. 96, s. 8.) Such costs must first be taxed

by the proper officer of the court before which the said indictment or information is tried ; and this should be done before the next commission of assize issues, if the case was tried at the Assizes, else the clerk of assize will be *functus officio* ; his taxation cannot be reviewed by the Queen's Bench Division. (*R.* v. *Newhouse*, 1 L. & M. 129 ; 22 L. J. Q. B. 127 ; 17 J. P. 57.) No special order to tax is necessary. (*R.* v. *Sully*, 12 J. P. 536.) In the case of an information, the record being in the Queen's Bench Division, execution may issue on taxation in the ordinary way. (*R.* v. *Latimer*, 15 Q. B. 1077 ; 20 L. J. P. B. 129 ; 15 Jur. 314.) But in the case of an indictment not in the Queen's Bench Division, there is no way of issuing execution for such costs ; they must be recovered therefore by an ordinary action at law. (*Richardson* v. *Willis*, L. R. 8 Ex. 69 ; 42 L. J. Ex. 15, 68 ; 27 L. T. 828 ; 12 Cox, C. C. 298, 351.)

So if a defendant pleads a justification and the issue be found for the prosecutor, the prosecutor may recover from the defendant the costs he has sustained by reason of such plea, whatever be the result of any other issues. (6 & 7 Vict. c. 96, s. 8.)

But this section does not apply to crown prosecutions, or to any proceedings for blasphemous, obscene or seditious libels. And there is no provision enabling a prosecutor to recover the general costs of the prosecution. Sometimes, however, if a fine be imposed on the defendant as part of his sentence, the prosecutor may, by memorializing the Treasury, obtain a portion of the fine towards the payment of his costs.

Where an indictment is removed by *certiorari* into the Queen's Bench Division the party applying for the writ (not being the Attorney-General) must give security for all subsequent costs.

Where a municipal corporation have directed a prosecution for a libel on one of their officers, the costs cannot be paid out of any borough fund. (*R* v. *Mayor, &c., of Liverpool*, 44 L. J. Q. B. 175 ; 20 W. R. 389 ; 26 L. T. 101.) Where the directors of a company [*610] have instituted a prosecution for a libel on themselves, the costs should not be paid out of the assets of the company, though the directors will not as a rule, be ordered to repay any costs already so paid. (*Pickering* v. *Stephenson*, L. R. 14 Eq. 322 ; 41 L. J. Ch. 493; 20 W. R. 654 ; 26 L. T. 608.) But where the libel is an attack upon the company itself, and calculated to injure its credit or diminish its business, the costs of a prosecution may rightly be paid out of the funds of the company. (*Studdert* v. *Grosvenor*, 33 Ch. D. 528 ; 55 L. J. Ch. 689 ; 34 W. R. 754 ; 55 L. T. 171 ; 50 J. P. 710 ; *ante*, p 373.)

PART II.

PRACTICE AND EVIDENCE IN PROCEEDINGS BY WAY OF CRIMINAL INFORMATION.

Motion for the Order Nisi.

An *ex officio* information is filed by the Attorney-General of his own motion. All other criminal informations are filed by the Queen's coroner and attorney, formerly called the Clerk of the Crown ; he may not file any information without an express order of the Queen's Bench Division granted in open court. (4 Wm. & Mary, c. 18, s. 1 ; Crown Office Rules, 1886, r. 46.) Counsel must move the court upon proper affidavits for an order *nisi* calling upon the defendant to show cause why an information should not be granted. The motion must be made within a reasonable time after the offence complained of. (*Ib.* r. 48.) The former rule was that the application must be made within two terms after the publication, or at all events within two terms after the libel came to the knowledge of the prosecutor. The prosecutor, too, must come to the court in the first instance, and must not have attempted to obtain redress in other ways. (*R.* v. *Marshall*, 4 E. & B. 475, *ante*, p. 431.) He must submit himself to the court, and consent to waive his civil remedy by action, if need be, and must be prepared to go through with the criminal proceedings to conviction. It is unnecessary to obtain the *fiat* of the Director of Public Prosecutions in England or of the Attorney-General in Ireland before moving, as section 3 of the Newspaper Libel and Registration Act does not apply to any application for a criminal information whether *ex officio* or otherwise. (*Yates* v. *The Queen*, (C. A.) 14 Q. B. D. 648 ; [*611] 54 L. J. Q. B. 258 ; 33 W. R. 482 ; 52 L. T. 305 ; 15 Cox, C. C. 686 ; 49 J. P. 436.)

The affidavits on which the application is based should be carefully drawn up ; as no second application may be made on amended or additional affidavits. (*R.* v. *Franceys*, 2 A. & E. 49.) They should in the first place prove the publication by the defendant. Mere *primâ facie* evidence of this will not be sufficient. (*R.* v. *Baldwin*, 8 A. & E. 168 ; *R.* v. *Willett*, 6 T. R. 294.) There must be before the court legal evidence sufficient to justify a grand jury in returning a true bill for the same offence. Thus, in *R.* v. *Stanger*, L. R. 6 Q. B. 352 ; 40 L. J. Q. B. 96 ; 19 W. R. 640 ; 24 L. T. 266, the affidavits merely showed that the annexed copy of the *Newcastle Daily Chronicle*, the newspaper containing the libel, had been purchased from a salesman in the office of that paper, and that in a footnote at the end of that copy the defendant was stated to be the printer and publisher of the newspaper, and the relator believed him so to be ; it was held that this was no legal evidence of publication, and the rule was discharged. If the defendant keeps an office or shop at which copies of the paper can be purchased, then an affidavit by a person who purchased a copy of the libel at such office or

shop will be the best evidence of a publication by the defendant, and also that most easily obtainable. That the purchase was made expressly for the purpose of enabling such affidavit to be sworn is no objection. (*Duke of Brunswick* v. *Harmer*, 14 Q. B. 189; 19 L. J. Q. B. 20; 14 Jur. 110; 3 C. & K. 40.)

It is a doubtful point whether the omission of such strict proof of publication can subsequently be supplied by the admission, if any, in the defendant's affidavits filed to show cause against the order being made absolute. The courts have generally refused to look at defendant's affidavits to supply a defect in those of the prosecutor. (*R.* v. *Baldwin*, 8 A. & E. 169.) For the rule is that the prosecutor can at the argument refer to no document which does not appear on the face of the order itself to have been read at the first application. (*R.* v. *Woolmer and another*, 12 A. & E. 422.) But Lord Kenyon, in *R.* v. *Mein*, 3 T. R. 597, and Blackburn, J., in *R.* v. *Stanger*, L. R. 6 Q. B. 355; 40 L. J. Q. B. 96; 19 W. R. 640; 24 L. T. 266, expressed an opinion that the court might look at any evidence lawfully before them for any purpose they pleased.

The prosecutor must also swear to his innocence in all particulars of the charge contained in the libel. (*R.* v. *Webster*, 3 T. R. 388.) For although at the trial of the information when granted truth will be no defence, except under Lord Campbell's Act, still it is "sufficient cause to prevent the interposition of the court in this extraordinary man[*612] ner;" they will leave the prosecutor to proceed by way of indictment in the ordinary course. (*R.* v. *Bickerton*, 1 Stra. 498; *R.* v. *Draper*, 3 Smith, 390.)

If there is no specific charge in the libel, no such affidavit is necessary (*R.* v. *Williams*, 5 B. & Ald. 595), and it has also been dispensed with in other special circumstances. But as a rule there must be a specific denial on oath of the particular charges, even where it is a duke that is aspersed. (*R.* v. *Haswell and Bate*, 1 Dougl. 387.) If a general charge be made and a specific instance alleged, the affidavit must expressly negative not only the general charge, but also the specific instance. (*R.* v. *Aunger*, 12 Cox, C. C. 407.)

The affidavits should be sworn with *no* heading or title. They should not contain irrelevant or improper matter; if the prosecutor abuses the alleged libeller or shows an *animus* against him, the court will very probably reject the application. (*R.* v. *Burn*, 7 A. & E. 190.)

The order *nisi*, if granted, should be drawn up "Upon reading" the alleged libel and the affidavits and all other documents to which it is desired to refer on the argument. It should be personally served on the defendant.

Argument.

The defendant now shows cause. He generally files affidavits in reply. It is open to him to maintain that the libel is true. (*R.* v. *Eve and Parlby*, 5 A. & E. 780; 1 N. & P. 229.) See *ante*, p. 611.) He may also contend that the libel complained of did not apply to the relator. (*R.* v. *Barnard, Ex parte Lord R. Gower*, 43 J. P. 127, *ante*, p. 133.) This decision is perhaps to be regretted; as it

opens a door by which a libeller may escape punishment, provided he is careful not to expressly name his victim in the first place, and not too scrupulous to swear a falsehood afterwards. The writer of a libel may richly deserve punishment although it may not be clear to whom he intended the libel to apply; and the court in granting a criminal information regards the interests of public morality and order rather than those of the individual prosecutor. (See 3 Times L. R. 255.)

If the order be discharged on the merits, the court generally gives the defendant his costs. And no second application may be made to the court, even upon additional affidavits (*R.* v. *Smithson*, 4 B. & Ad. 862), except in very peculiar circumstances, as where the only person who had made an affidavit on behalf of the defendant on the argument of the first order has since been convicted of perjury in respect of such affidavit. (*R.* v. *Eve and Parlby*, 5 A. & E. 780; 1 N. & P. [*613] 229.) But though the prosecutor cannot apply a second time for a criminal information, he can still prefer an indictment in the ordinary way (*per* Lord Denman, in *R.* v. *Cockshaw*, 2 N. & Man. 378); though he cannot as a rule bring an action (*ante*, p. 458.)

Compromise.

Frequently, however, the defendant files exculpatory affidavits, apologizing to the prosecutor, withdrawing all imputations upon him, and entreating the mercy of the court. When this happens, the prosecutor is generally quite satisfied; he has obtained all he desired: and by no means courts the expense and notoriety of a prolonged criminal trial. But the court is not disposed on that account merely to allow the proceedings to drop, even at the request of the prosecutor; and in more than one recent case the Queen's Bench Division have compelled a reluctant prosecutor to take a rule in the interest of the public. Having invoked the aid of the criminal law, it is his duty not to abandon the proceedings merely because his own private purpose is attained. (See *R.* v. "*The World*," 13 Cox, C. C. 305.)

Trial and Costs.

If the order be made absolute, the prosecutor must enter into a recognizance to effectually prosecute the information and to abide by and observe the order of the court. The amount of recognizance is fixed by r. 46 of the Crown Office Rules, 1886, at £50. (But see 4 Wm. & M. c. 18, s. 1, and *R.* v. *Brooke*, 2 T. R. 190.)

The information must set out the libel, &c., with all the certainty and precision of an indictment. (See Precedents Nos. 93, 96, *post*, pp. 673, 676.) As soon as it is filed a copy must be served on the defendant. The defendant must appear thereto within the times specified in rr. 83—89 of the Crown Office Rules, 1886; and see r. 44. If he does not he may be attached under a judge's warrant (48 Geo. III. c. 58, s. 1). After appearance the defendant has ten days within which to plead or demur. (Crown Office Rules, 1886, r. 131.)

His plea is duly entered on the record, which is then made up and sent down for trial to the county in which the libel was published, unless a trial at bar be demanded. The record may be amended by a judge at chambers after plea and before trial. (*R.* v. *Wilkes* (1764—1770) 4 Burr. 2568; 2 Wils. 151.) The trial of an information for libel in all respects resembles the trial of an indictment; save that in *ex officio* informations, the counsel for the Crown (whether the Attorney-General [* 614] himself or any one appearing for him), has the right to reply, although the defendant calls no witness. (*R.* v. *Horne*, 20 How. St. Tr. 660; 11 St. Tr. 264; Cowp. 672.) The trial must take place within one year after issue joined; and if not, or if the prosecutor enters a *nolle prosequi*, the court, on motion for the same, may award the defendant his costs to the amount of the recognizance entered into by the prosecutor on filing the information. (Crown Office Rules, 1886, r. 49.) If on any information by a private prosecutor for the publication of any defamatory libel, judgment shall be given for the defendant, he shall be entitled to recover from the prosecutor the costs sustained by the said defendant by reason of such information. (*Ib.* r. 50.) And the judge at the trial can not in this case deprive the successful defendant of his costs by certifying that there was reasonable cause for the information. (R. v. *Latimer*, 15 Q. B. 1077; 20 L. J. Q. B. 129; 15 Jur. 314.) The master of the Crown Office taxes the costs under a side-bar rule; and he may allow costs incurred by the defendant previously to the filing of the information. (*R.* v. *Steel and others*, 1 Q. B. D. 482; 45 L. J. Q. B. 391; 24 W. R. 638; 34 L. T. 283; 13 Cox, C. C. 159; (C. A.) 2 Q. B. D. 37; 46 L. J. M. C. 1; 25 W. R. 34; 36 L. T. 634.) On such taxation execution issues in the ordinary way. (*R.* v. *Latimer*, *ubi supra*.) There is no power, however, to condemn the defendant to pay the cost of the prosecution, if he be convicted or plead guilty, unless indeed he files a special plea of justification under Lord Campbell's Act, in which case he will have to pay the costs incurred by reason of that plea. (See 6 & 7 Vict. c. 96, s. 8, *post*, p. 718; and r. 50 of Crown Office Rules, 1886.)

APPENDIX A.

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I. PRECEDENTS OF PLEADINGS IN ACTIONS OF LIBEL AND SLANDER.

Statements of Claim.

No. 1.

[*618] *Character of a Servant.*

1886.—J.—No. 1986.

In the High Court of Justice,
Queen's Bench Division.
Writ issued on the 13th day of Dec. 1886.
Between Sarah Jones *Plaintiff*,
and
Henry Roberts
and Alice his wife . . . *Defendants.*

Statement of Claim.

1. The male defendant is a gentleman residing at —— Hall near Evesham in the county of Worcester, and the female defendant is his wife. The plaintiff is a housemaid and was formerly in the service of the defendants in that capacity.

2. On the 15th day of September 1886 the female defendant falsely and maliciously wrote and published of the plaintiff the words following, that is to say :—"While she (meaning thereby the plaintiff) was with us, she stole a quantity of our house-linen, and pawned it in the High Street." *

The plaintiff claims £200 damages.

Place of trial : Gloucester.

(Signed)———.

Delivered the 15th day of Jan. 1887.

[*619] No. 2.

Words in a Foreign Language.

1. The plaintiff is a farmer residing at ——— in the county of Glamorgan.

2. On the ——— day of ——— 1886 the defendant falsely and maliciously wrote [*or* spoke] and published of the plaintiff in the Welsh language the words following, that is to say :—[*Here set out the libel verbatim in Welsh.*]

3. The said words mean in English, and were understood by those

* No innuendo is necessary.

to whom they were published [*or* those who heard them] to mean:—[*Here set out the translation.*]

Or if an innuendo is necessary as well as a translation :

3. The following is a literal translation of the said words :—"He is a devil of a shaved pig." The defendant meant thereby, and those who read [*or* heard] the said words understood him to mean thereby that the plaintiff was insolvent and had been stripped of his last penny and was unable to pay his just debts.

4. Whereby the plaintiff was much injured in his credit and reputation, &c. [*Add any special damage that may exist.*]

And the plaintiff claims £—— damages.

No. 3.

Libel contained in a Placard.

1. The plaintiff is, &c.

2. The defendant on or about the 10th day of January 1887 falsely and maliciously caused to be printed and published a certain libellous placard referring to the plaintiff as follows:—[*Here set out the placard.*]

3. The defendant caused one of such placards to be posted up opposite the plaintiff's shop, and several others in its immediate neighborhood.

4. The plaintiff has in consequence suffered much annoyance, and has been disgraced and subjected to loss of reputation and of business, and has suffered in his credit and good name, and has incurred public odium and contempt.

The plaintiff claims £1,000 damages.

[*620] No. 4.

Action for Reading a Libel aloud.

M. and Wife v. *N. and Wife.*

1. On the 8th day of November 1886 the following anonymous letter appeared in the "Dover Express" :—

[The letter described a brutal assault on a child by a tipsy woman, who was not in any way identified.]

2. Thereupon the female defendant called the attention of the plaintiff's mother to the said letter, and referring to the said letter falsely and maliciously spoke and published of the plaintiff Mary the words following, that is to say :—"The woman referred to in that letter is Henry's wife."

3. The female defendant meant thereby that the plaintiff Mary had cruelly and brutally and with inhuman violence assaulted and

ill-treated her own child, and that she had been guilty of an indictable offence.

4. Alternatively, the female defendant falsely and maliciously published of the plaintiff Mary the said libellous words set out in paragraph 1 above, by showing them to the plaintiff's mother and reading them aloud to her, representing to her that the woman therein referred to was the plaintiff Mary, meaning thereby the plaintiff Mary had been guilty of a brutal and inhuman assault upon her own child, and that she had been drunk in one of the public streets of Dover.

And the plaintiffs claim £1,000 damages.

No. 5.

Showing an Anonymous Letter—Special Damage.

Robshaw *v.* Smith, 38 L. T. 423, *ante*, pp. 207, 208.

"1. The defendant is the general manager of the London and Yorkshire Bank (Limited), and the plaintiff carries on business as a merchant at ——— Street, in the City of London.

"2. Prior to the 31st of May 1877 the plaintiff had had considerable business transactions with one J. H., also a merchant, from which he had derived large profits, and several such transactions were then in progress between the plaintiff and the said J. H., and the said [*621] J.H. would have continued to have such transactions with the plaintiff hereinafter referred to, and the said J. H. had offered the plaintiff to take him into his employment as manager, upon terms which would have given the plaintiff a salary of from £3,000 to £4,500 per annum for his services.

"3. On the 31st May the said J. H. called upon the defendant, and the defendant then falsely and maliciously published to the said J. H. the following letter of and concerning the plaintiff:—

[*Here copy letter.*]

"4. Owing to the conduct of the defendant set forth in the preceding paragraph, the said J. H. refused to have any further transaction with the plaintiff, and the plaintiff lost the profits he would otherwise have made thereby, and the said J. H. also refused to take the plaintiff into his employment as he would otherwise have done, and the plaintiff has lost the benefit of such employment and the emoluments thereof, and has been much injured in his credit, reputation and business, and has been otherwise damnified.

"The plaintiff claims £2,000 damages."

No. 6.

Libel on a Town Clerk.

"1. The plaintiff has been for thirty-three years, and was at the time of the writing and publication of the libel hereinafter com-

plained of, town clerk of the parliamentary and municipal borough of ——— in the county of ———, and has for many years practised as a solicitor within the said borough, and held various appointments therein.

"2. The defendant is a member of the town council of the said borough.

"3. On the 12th October 1886 the defendant falsely and maliciously wrote and caused to be printed and published of the plaintiff in respect of his said office of town clerk in a newspaper called the '——— Gazette,' which has a wide circulation in the said borough, the words following, that is to say—[*here set out the libel verbatim*]: meaning thereby that the plaintiff had been guilty of gross misconduct in the discharge of his official duties, and had acted as such town clerk in a manner which was unjustifiable and discreditable to him, and had not been neutral, impartial and without respect of person or party in the discharge of his said duties, but had been [* 622] actuated by improper, partial and corrupt motives therein, and had lost and was losing the respect, confidence and support of his fellow-townsmen.

"4. By reason of the premises the plaintiff has been injured in his character and reputation, and has suffered damage.

"The plaintiff claims £1,000 damages."

No. 7.

Libel on a Solicitor—Injunction.

"1. The plaintiff is a solicitor and the senior partner in the firm of W., G. & T., which carries on an extensive practice in the counties of ———. The plaintiff holds many public appointments; he is election agent for ———, &c.

"2. On Jan. 9th 1886 the defendant falsely and maliciously spoke and published of the plaintiff, as such solicitor and election agent as aforesaid, and of and concerning his practice and profession and his mode of conducting the said recent election, and caused to be widely circulated throughout the said counties, the words following, that is to say:—

[*Here set out the alleged slander, adding any innuendoes which may be necessary.*]

"3. Subsequently the defendant falsely and maliciously, and with intent still further to wound and annoy the plaintiff, and to injure him in his said profession, caused a report of his speech, set out in paragraph 2 above, to be reprinted from a newspaper called 'The ——— Post,' and published of the plaintiff as aforesaid, and with the meaning aforesaid, in the shape of a leaflet or sheet for distribution. This report was (omitting for the sake of brevity certain words appearing in the original at the place marked with asterisks) as follows:—

"'Those gentlemen' (meaning the plaintiff amongst others) 'who had worked against him' (meaning thereby the defendant),

'and unfairly worked against him, had worked not so much against him as against their own cause. * * * It was his fervent hope and prayer, &c. * * *'

"4. The defendant has caused the said leaflet to be very widely circulated in the said counties on the 21st and 22nd days of January 1886, and still continues to circulate and distribute the same.

[*623] "Whereby the plaintiff has been injured in his credit and reputation, and in his said practice or profession, and has otherwise been much injured and damnified.

"And the plaintiff claims:—

"(1) Damages £2,000.

"(2) An injunction to restrain the defendant and his agents from further circulating, distributing or otherwise publishing, the said leaflet, or any other reprint of the said speech, or any further or other libels affecting the plaintiff in his profession and offices or otherwise."

No. 8.

Libel on Architects in the way of their Profession.

BOTTERILL AND ANOTHER *v.* WHYTEHEAD, 41 L. T. 588.

"1. The plaintiffs are brothers carrying on in partnership at ——— the profession and business of architects.

"2. At or about the time of the writing and publishing of the libels hereinafter complained of, the plaintiffs were, as the defendant well knew, employed by a committee formed for the restoration of a church at at South Skirlaugh, near Hull, to superintend and carry out the restoration of the said church, and were appointed by the said committee as architects for that purpose.

"3. On the 8th April 1878 after the appointment of the plaintiffs as such architects as aforesaid, the defendant in a letter written and sent to Mr. Bethel, a member of the said committee, falsely and maliciously wrote and published of the plaintiffs, in relation to their profession and business of architects, and the carrying on and conducting thereof by them, the words following, that is to say:—

"'I see in the 'Hull News' of Saturday that the restoration of Skirlaugh Church has fallen into the hands of an architect who is a Wesleyan, and can show no experience in church work. Can you not do something to avert the irreparable loss which must be caused if any of the masonry of this ancient gem of art be ignorantly tampered with. Your great influence would surely have much weight in the matter.'

"Meaning thereby that the plaintiffs were incompetent to superintend and carry out the restoration of the said church, and that, if the [*624] restoration were left in the hands of the plaintiffs, the old masonry of the church would be ignorantly tampered with and would not be treated with proper spirit and feeling, and would suffer from their incompetence and want of skill.

"4. On or about the 16th April 1878, and after the appointment of the plaintiffs as such architects as aforesaid, the defendant, in a letter addressed to Mr. Barnes, the incumbent of Skirlaugh Church, falsely and maliciously wrote and published of the plaintiffs, in relation to their profession and business of architects, and the carrying on and conducting thereof by them, the words following, that is to say :—

"'I am annoyed to see that you and your committee have engaged Messrs. B. as architects for the restoration of your church. Are you aware that they are Wesleyans, and cannot have any religious acquaintance with such work?'

"Meaning thereby that the plaintiffs were incompetent to undertake and superintend the restoration of the said church, and were unable to carry it out with adequate spirit and feeling.

"5. By reason of the premises and the publication of the said libels the plaintiffs have been and are injured in their said profession and business and have suffered in their credit and reputation as architects.

"The plaintiffs claim, &c."

No. 9.

Words imputing a Crime.

The plaintiff has suffered damage by the defendant falsely and maliciously speaking and publishing of the plaintiff on May 8th 1886 the words following, that is to say :—"He is a regular smasher;" meaning thereby that the plaintiff had uttered, and was in the habit of uttering, counterfeit coin, with the knowledge that such coin was counterfeit, and had been guilty of an indictable offence.

And the plaintiff claims £———

[N.B. This very compendious form can only be used in the simplest cases.]

[*625] No. 10.

Words imputing a Contagious Disorder.—Special Damage.

"1. At the time of the speaking and publishing by the defendant of the words hereinafter set out the plaintiff was a tailor carrying on business at ———, and was a married man.

"2. The defendant falsely and maliciously spoke and published of the plaintiff the words following (that is to say): "I" (meaning the defendant) "hear L." (meaning the plaintiff) "has, &c.," thereby meaning that the plaintiff was suffering from a loathsome contagious disorder, and had communicated the same to his wife, and was unfit by reason of such disorder to be admitted into society.

"3. By reason of the premises the plaintiff was injured in his

credit and reputation,* *and brought into disgrace among his neighbours and friends, and has been deprived of, and ceased to receive their hospitality.*

"4. The defendant falsely and maliciously spoke and published of the plaintiff, in relation to his said business, the words following (that is to say): "I" (meaning the defendant), "&c.," thereby meaning that the plaintiff was in embarrassed pecuniary circumstances, and unable to meet his liabilities.

"5. By reason of the matters in the preceding paragraph mentioned the plaintiff was injured in his credit and reputation as a tailor, and in his business,* *and many persons, who had theretofore dealt with the plaintiff in his said business, ceased to deal with him.*

"The plaintiff claims £——— damages."

[* The plaintiff was ordered to give particulars of the names of the "neighbours and friends" and of the "many persons" referred to in paragraphs 3 and 5; but was unable to do so: thereupon the words in italics were struck out of his Statement of Claim.]

No. 11.

Slander of a Clergyman.

"1. The plaintiff is and at all times hereinafter mentioned was a clergyman of the Church of England, a doctor of divinity and vicar of the parish of ———.

"2. It is, and was, the custom and the duty of the plaintiff as such vicar as aforesaid to constantly visit the parochial school in his said [*626] parish and to superintend the management thereof. Miss E. B. was and is the mistress of the said school.

"3. Thereupon the defendant on the 25th day of April 1880 well knowing the premises and intending to injure the plaintiff in his good name and credit as a clergyman of the Church of England and to cause it to be believed that the plaintiff had misconducted himself as such vicar as aforesaid falsely and maliciously spoke and published of the plaintiff in relation to his profession as a clergyman of the Church of England, and to his office as such vicar as aforesaid and to the plaintiff's conduct therein, the words following, that is to say:—"Miss E. B. (meaning thereby the said schoolmistress), &c." Meaning thereby that the plaintiff had been guilty of undue familiarity with the said Miss E. B., and had habitually been guilty of conduct unbecoming a clergyman of the Church of England, and had misconducted himself in his office as such vicar as aforesaid, and was unfit to continue in the same, or to hold any other preferment.

"4. The plaintiff has thereby been greatly injured in his credit and reputation, and in his said profession as a clergyman of the Church of England and in his office as such vicar as aforesaid, and brought into public scandal, ridicule and contempt.

"And the plaintiff claims £—— damages."

No. 12.

Slander of a Medical Man.

1. The plaintiff is a M. R. C. S. of London and Edinburgh, and carries on the profession and business of a surgeon and general medical practitioner in the city of ——— and its neighbourhood.

2. On the 9th day of January 1880 the plaintiff was called in by the defendant to attend to his infant daughter, who was then lying dangerously ill. On the 14th day of January the said daughter died, through no negligence or default of the plaintiff.

3. Thereupon the defendant falsely and maliciously spoke and published of the plaintiff in relation to his said profession and business and his conduct therein, the words following, that is to say :— "Mr. E. (meaning the plaintiff) killed my child."

4. The defendant meant thereby that the plaintiff had been guilty of feloniously killing his said daughter by treating her improperly [*627] and with gross ignorance and with gross and culpable want of caution and skill, and thus causing or accelerating her death.

5. In the alternative, the plaintiff says that the defendant meant thereby that the plaintiff had been guilty of misconduct and negligence in his said profession and business, and had acted in his said profession and business negligently, injudiciously, indiscreetly and improperly, and had not done his duty by his patient, and was unfit to be employed as a medical man.

6. In consequence of the defendant's words the plaintiff has been and is greatly prejudiced and injured in his credit and reputation, and in his said profession and business of surgeon and general medical practitioner.

The plaintiff claims, &c.

(See *Edsall* v. *Russell*, 4 M. & Gr. 1090 ; 12 L. J. C. P. 4.)

No. 13.

Slander of a Solicitor—Injunction.

1. The plaintiff is a solicitor carrying on business at ———. He had before the utterance of the slander hereinafter mentioned been retained and employed by the defendant to act for him as his solicitor in an action which the defendant lost.

2. On the 1st day of April 1884 the defendant falsely and maliciously spoke and published of and concerning the plaintiff in relation to his profession as a solicitor the words following :— meaning thereby that the plaintiff had been guilty of dishonourable and unprofessional conduct in his practice as a solicitor, and that the said action had been lost through the culpable negligence or fraudulent malpractice of the plaintiff, and that the plaintiff had cheated and defrauded his client, the defendant, and would similarly cheat and defraud other clients.

3. Whereby the plaintiff has been greatly injured in his credit and reputation, and in his profession as a solicitor.

And the plaintiff claims :—

(1) £500 damages.

(2) An injunction to restrain the defendant from repeating the said slander, or any other slanders injuriously affecting the plaintiff in his profession as a solicitor or otherwise.

[*628] No. 14.

Slander of a Trader in the way of his Trade—Special Damage.

1. The plaintiff is and at the times hereinafter mentioned was a baker, carrying on business at ——— in the county of ———.

2. On and about the ——— day of ——— 1886 the defendant falsely and maliciously spoke and published of the plaintiff in the way of his trade and in relation to his conduct therein, the words following, that is to say :—[*here set out the slander verbatim*]; meaning thereby that the plaintiff cheated or was guilty of fraudulent, corrupt and dishonest practices in his said business.

3. In consequence of the said words the plaintiff was injured in his credit and reputation as a baker and in his said business and trade, and X., Y. and Z., who had heretofore dealt with the plaintiff in his said trade, ceased to deal with him.

The plaintiff claims £———.

No. 15.

Another Form.

1. The plaintiff is a grocer carrying on business at Coventry, and has suffered damage by the defendant falsely and maliciously speaking and publishing of him in relation to his said business the following words, that is to say:—

(*a*) "The big grocer has failed." These words were spoken by the defendant to Mrs. E. B. of C.——— Street, Leamington, on or about the 30th of May 1883. Mrs. B. asked "Whom do you mean by 'the big grocer?'" The defendant replied "I mean Mr. L. of Coventry (the plaintiff): a commercial traveller told me in my office that he had failed."

(*b*) "Mr. L. is in Queer Street, and everybody knows it." These words were spoken by the defendant to Mr. C. B. of Coventry, accountant, on June 7th 1883 ; and to several commercial travellers, and especially to Mr. John Brown who travels for the wholesale house of Candy & Co.

2. The defendant thereby meant and was understood to mean that the plaintiff was insolvent, and was unable to meet his liabili-

ties, and had filed a petition in the Bankruptcy Court for liquidation of his affairs by arrangement or composition with his creditors.

[*629] *Particulars of Special Damages.*

(*a*) In consequence of the defendant's above-mentioned statement to Mr. John Brown, Messrs. Candy & Co. who had previously supplied the plaintiff with goods on credit, refused to sell any more goods to the plaintiff on credit, as they otherwise would have done.

(*b*) Since the said slanders were uttered, and in consequence thereof, there has been a general decline in the plaintiff's business and a considerable loss of profit to him.

The plaintiff claims £——— damages.

No. 16.

Words imputing Insolvency.—Special Damage.

"1. The plaintiff is a private gentleman owning lands in Shropshire. The defendant is a solicitor carrying on business at Shrewsbury.

"2. Between the 13th of November 1886 and the 31st of January 1887 the defendant has repeatedly spoken and published of the plaintiff falsely and maliciously, and with the deliberate intention of injuring and annoying the plaintiff, and causing his creditors to press for immediate payment of their debts, the words following: 'Mr. X. (meaning the plaintiff) is insolvent. He owes money right and left. He cannot face his creditors. He is leaving the county deeply in debt. Does he owe you any money? You must look sharp after it. He cannot pay. You had better let me issue a writ against him for the amount.'

"3. The plaintiff has thereby been greatly injured in his credit and reputation, and has also suffered special damage, whereof the following are the particulars:—

"(*a.*) In consequence of what the defendant said to him, one George Morris pressed the plaintiff for payment of the sum of £40 before the agreed period of credit had expired, and has issued a writ against the plaintiff for that amount, which he would not otherwise have done.

"(*b.*) In consequence of what the defendant said to them, the directors of the Shropshire Banking Company applied to the plaintiff for the sum of £250 for which he was a surety to them for one A. B., and required the immediate payment thereof, which they would not otherwise have done.

[*630] "(*c.*) Mrs. Ann Graham was induced by what the defendant said to call in the sum of £350 secured to her by an indenture of mortgage dated the 18th day of July 1884, and made between her and the plaintiff, and to threaten in default of payment to exer-

cise the power of sale contained in the said indenture, which she otherwise would not have done.

"And the plaintiff claims £500 damages."

No. 17.

Words not actionable without proof of Special Damage.

CHAMBERLAIN *v.* BOYD.

"1. In the month of May last the plaintiff and his brother, Mr. W. C., were candidates for membership of the Reform Club. The defendant was a member of the said club.

"2. Upon a ballot of the members of the said club the plaintiff and his brother were not elected to membership.

"3. Subsequently to the said ballot a meeting of the members of the said club was called to consider a proposed alteration of the rules regulating the election of members, and the defendant took an active and personal interest in the matter.

"4. With a view to retain the regulations as they then existed, and to secure the exclusion of the plaintiff from membership of the said club, the defendant falsely and maliciously spoke and published of the plaintiff, together with his said brother, the words following, that is to say :—[*words not actionable per se*] meaning thereby that the plaintiff had been guilty of conduct which unfitted him for membership of the Reform or any similar club.

"5. By reason of the said defamatory publications the defendant induced, or contributed to inducing, a majority of the members of the said club to retain the regulations under which the plaintiff had been rejected, and thereby prevented the plaintiff from again seeking to be elected to the said club. The plaintiff thus lost the advantage which he would have derived from again becoming a candidate with the chance of being elected, and the plaintiff suffered in his reputation and credit.*

"The plaintiff claims £5,000 damages."

[*631] No. 18.

Action by Husband and Wife for slander of the Wife.

"1. The plaintiff George is a licensed victualler, and keeps the "White Horse Inn" at ——— ; the plaintiff Elizabeth is his wife, and assists him in the business of the said inn.

"2. On the 15th day of January last the plaintiff Elizabeth was, in the absence of her husband, managing and superintending the said business at the said inn, when the defendant came into the said

* The special damage here alleged was held too remote in the Court of Appeal, 11 Q. B. D. 407 ; 52 L. J. Q. B. 277 ; 31 W. R. 572 ; 48 L. T. 328 ; 47 J. P. 372.

inn and asked her to serve him with drink, which she refused to do on the ground that he had already had enough.

"3. Thereupon the defendant falsely and maliciously spoke and published of the plaintiff Elizabeth, and in relation to her as managing and superintending the said business as aforesaid, and in the hearing of several customers of the said inn, the words following, that is to say :—

* * * * * * *

Meaning thereby that the plaintiff Elizabeth was an immoral character, and was living in adultery, and was unfit to have the management and superintendence of the said business.

"4. By reason of the premises the plaintiff George was injured in his said business, and the plaintiff Elizabeth was injured in her character and reputation.

Particulars of special damage suffered by the plaintiff George.

[].

"Each of the plaintiff's claims £50 damages."

No. 19.

Notice of Action.

[*To be served a clear calendar month before action.*]

To A. B. Esq., Chief Constable of the Borough of ———.

I, C. D. of ———, in the said borough of ———, in the county of ———, according to the statute in that behalf, give you notice that I, the said C. D., will at or soon after the expiration of one calendar month from the time of your being served with this notice, cause a writ of summons to be sued out of the Queen's Bench Division of the High Court of Justice, by E. F. of ———, as [*632] solicitor for me and on my behalf, against you at the suit of me, the said C. D., and proceed thereupon according to law: For that you, the said A. B., on the ——— day of ——— 1886 at the Town Hall and at the police station of the said borough of ——— falsely and maliciously wrote and published of and concerning me certain libels contained in a report presented by you to the watch-committee of the said borough, and in general order (358) issued by you to the police force, and also on the said ——— day of ——— 1886, or shortly afterwards, at the police station aforesaid, falsely and maliciously slandered me by reading, or causing to be read, the said general order to the said police force, to my great loss and injury, for which I claim £——— damages.

Dated this ——— day of ——— 1886.

Yours, &c.,
C. D.,
of ———, in the said borough of ———,
in the said county of ———.

No. 20.

Summons for Particulars.

Let all parties concerned attend the Master in Chambers, Central Office, Royal Courts of Justice, Strand, London, on Monday the 21st day of March 1887, at 1 o'clock in the afternoon, on the hearing of an application on the part of the defendant, for an order that the plaintiff do deliver to the defendant, within four days, an account in writing of the particulars, showing when, where and to whom the alleged libel and slanders were written, spoken and published, and also particulars of the special damage alleged in paragraph 5 of the statement of claim, and that in default of the delivery of such particulars the plaintiff be precluded from giving any evidence in support thereof on the trial of this action ; and that the defendant have seven days time to deliver his defence after the delivery of the said particulars.

Dated the ——— day of ———, 18—.

This summons was taken out by Messrs. S. & P., of ———, solicitors for the defendant.

To the plaintiff, or Messrs. R. & F., his solicitors.

[*633] No. 21.

Particulars.

Delivered pursuant to the order of Master Walton, made herein and dated the 21st day of March, 1887.

The following are the best particulars the plaintiff can give of the times, places and persons, when, where and to whom the alleged libels and slanders were published, and of the damages sustained by him :

1. The said libel was written by the defendant, and published by him to A. B. of ———, at ———, on or about December 29th, 1886, and to C. D. of ———, at ———, on or about January 2nd, 1887.

The plaintiff is unable at present to name anyone else to whom the said libel was published, but believes that the defendant kept a copy of the said libel and showed it to several other persons, and will deliver further particulars of their names as soon as they are ascertained.

2. The said slanders were uttered in the month of December, 1886, in the presence of G. R., of 20 High Street, in the said city, and his manager, W. K., at 20 High Street, aforesaid.

3. The following persons who used formerly to deal with the plaintiff ceased to do so in consequence of the defendant's conduct :

M. M. of ———,

O. P. of ———, &c.

The profits of the plaintiff's business must have fallen from £730 to £420 *per annum*.

Dated this 29th day of March, 1887.

R. & F., Solicitors for the plaintiff.

To the defendant, or Messrs. S. & P., his solicitors.

Defences.

No. 22.

Traverses.

1. The defendant never spoke or published the words set out in paragraph 2 of the statement of claim or any of them.*

[*634] 2. The defendant never spoke or published the words set out in paragraph 2 of the statement of claim with the meaning therein alleged.

3. The defendant denies that his words in any way referred to the plaintiff. They were not so understood by those who heard them uttered.

4. The plaintiff did not on the ——— day of ——— 1887 (*date of the publication*) carry on the business of a ——— as alleged in paragraph 1 of the statement of claim.

5. The defendant denies that he spoke or published the said words of the plaintiff in the way of his said business.

*The words "falsely and maliciously" must not be traversed, unless pleas of justification and privilege follow; and even then such a traverse is superfluous. (*Belt* v. *Lawes*, 51 L. J. Q. B. 359.)

No. 23.

Another Form.

1. In answer to paragraphs 3, 4 and 5 of the statement of claim, the defendants deny that they printed or published* the words therein set forth of or concerning plaintiffs or any of them, as is alleged.

2. In further answer to the said paragraphs the defendants deny that the words therein set forth bear the sense therein given to them.

*The words "falsely and maliciously" must not be traversed, unless pleas of justification and privilege follow; and even then such a tranverse is superfluous. (*Belt* v. *Lawes*, 51 L. J. Q. B. 359.)

No. 24.

Objection in Point of Law.

(Rules of the Supreme Court, 1883, Appendix E., Section III., No. 2.)

"The defendant says that:—

"1. The defendant did not speak or publish the words.

"2. The words did not refer to the plaintiff.

"3. The defendant will object that the special damage stated is not sufficient in point of law to sustain action."

See *ante*, p. 536, and Precedents, Nos. 29, 32, 51, *post*.

[*635] No Libel.

No. 25.

Bonâ fide Comment on Matters of Public Interest.

"The defendant's words did not bear or convey the meaning alleged in paragraph 2 of the statement of claim, or any defamatory meaning; they were fair comment on two matters then of great public interest in the said boroughs, viz:—the result of the recent General Election of 1885, and the strong probability of another General Election at a very early date."

No. 26.

Action against a Newspaper Proprietor.

Bonâ fide Comment on a Matter of Public Interest.

1. The defendant is, and at the time of the alleged grievances was, the proprietor of the *Times* newspaper.

2. On the evening of the 12th of Febuary 1867, the plaintiff had presented to the House of Lords a petition, making a serious charge against one of Her Majesty's judges; a debate ensued on the presentation of the said petition, and the said charge was utterly refuted.

3. The words set out in paragraph 3 of the statement of claim are a portion of the Parliamentary Report, published in the *Times* for the 13th of Febuary 1867. They are a fair and accurate report of the proceedings of the House of Lords on the preceding evening, and were published by the defendant *bonâ fide*, and without any malice towards the plaintiff.

4. The said petition, the charge it contained, and the said debate were, and are, all matters of general public interest and concern.

5. The words set out in paragraph 5 of the statement of claim are a portion of a leading article which appear in the *Times* for the 13 of Febuary 1867. The said article was a fair and impartial comment on the matters above referred to, and was published by the defendant *bonâ fide* for the benefit of the public and without any malice towards the plaintiff.

See *Wason* v. *Walter*, L. R. 4 Q. B. 73; 8 B. & S. 671; 38 L. J. Q. B. 34; W. R. 169; L. T. 409.

[* 636]

No. 27.

Matter of Public Interest.

Before the publication of the said alleged libel the plaintiff was the general commanding the cavalry division of our army in the Crimea, and the Earl of Cardigan was the general commanding the light cavalry brigade, part of such division; and during the war disputes arose and complaints were made by each of them of the conduct of the other, in their respective commands, in consequence of which disputes great disasters happened, and great losses of men and horses were sustained. These disputes between the plaintiff and the Earl of Cardigan were injurious to the service, and were matter of public notoriety and of discussion and complaint amongst her Majesty's subjects; the plaintiff was consequently recalled to England, and her Majesty issued a commission to Sir J. MacNeil and Colonel Tulloch to inquire into the causes of such disasters. The said commissioners made a report, animadverting upon the conduct of the plaintiff. A second commission afterwards issued to the Board of General Officers, at Chelsea, who also made a report with reference to the matters above mentioned. And the defendant says that the said reports and all the said matters became and were matters of public notoriety, discussion and interest, and the words complained of are part of an article printed and published in the said newspaper, which was a fair and *bonâ fide* comment upon the several matters aforesaid and in reference thereto, and were printed and published by the defendant as and for such comment and without any malicious interest or motive whatever.

See *Earl of Lucan* v. *Smith*, 1 H. & N. at pp. 482, 483; 26 L. J. Ex. 96, n; *Clinton* v. *Henderson*, 13 Ir. C. L. R. App. 43; *Hort* v. *Reade*, Ir. R. 7 C. L. 551.

No. 28.

The same.

Defence.

"1. The defendant admits that he printed and published the words set out in the statement of claim; but denies that he did so maliciously or with the meaning therein alleged or with any other [*637] defamatory meaning. The said words without the alleged meaning are not libellous, but are a *bonâ fide* comment on matter of public interest, namely, the conduct of certain persons at a public meeting called to oppose the London Municipal Reform Bill, at which meeting the plaintiff was a prominent speaker.

"2. As to the words 'the great Mr. ——— presiding with much

dignity over the Comus rout,' the defendant in the next issue of his paper published the following correction :—

[*Here set out the correction.*]

"3. The rest of the alleged libel in no way refers to the plaintiff. The 'fugleman' therein mentioned was not the plaintiff, but another gentleman."

No. 29.

Reply to No. 28.

"1. The plaintiff joins issue with the defendant upon the defence herein.

"2. The plaintiff will object at the trial that paragraph 2 of the defence affords no answer in point of law to the plaintiff's claim."

No sufficient publication.

No. 30.

No Publication.—No Slander.

Defence to Claim No. 13.

"1. The defendant denies that the plaintiff was or had at any time been retained or employed by him to act as his solicitor.

"2. The defendant denies that he spoke or published the words alleged or any of them.

"3. The defendant denies that he spoke the said words of or concerning the plaintiff in the way of his profession, or that the said words bore or were intended to bear the meaning alleged.

"4. If the defendant did speak the said words (which he denies), he says that no person other than the plaintiff was present or heard the same.

"5. The defendant will contend that the words which he spoke, if any, were only abuse and did not amount to defamatory matter."

[* 638] No. 31.

No conscious Publication.

Emmens *v.* Pottle & Son, (C. A.) 16 Q. B. D. 354 ; 55 L. J. Q. B. 51 ; 34 W. R. 116 ; 53 L. T. 808 ; 50 J. P. 228 ; 1 C. & E. 553.

Defence.

"1. The defendants deny that they published the alleged libels.

"2. Further and alternatively the defendants say that they are

newsvendors carrying on a large business at 14 and 15, Royal Exchange in the city of London, and as such newsvendors and not otherwise, sold copies of the said periodical called "Money" in the ordinary course of their business and without any knowledge of its contents; which are the alleged publications."

No. 32.

Reply to No. 31.

"1. The plaintiff joins issue on the 1st paragraph of the defence.

"2. As to the 2nd paragraph of the defence the plaintiff says that the allegations therein contained are bad in substance and in law, on the ground that even if the defendants sold copies of the said periodical without any knowledge of their contents and in the ordinary course of their business as alleged in their defence, still, inasmuch as the defendants sold the said copies as newsvendors for reward in that behalf, the said allegations disclose no answer to the claim of the plaintiff."

No. 33.

Innocent publication of a Libellous Novel.

1. The defendants admit that they printed and published the book or novel in the statement of claim mentioned, but deny that they did so maliciously. The defendants printed and published the said book or novel for the writer thereof, reasonably and *bonâ fide* believing the same to be a work of pure fiction. The defendants were not then aware and do not now admit that the said book or novel alluded to the plaintiffs or to any other living person.

It may be doubted whether this is a defence to the action or only a plea in mitigation of damages; see *ante*, pp. 160, 435; *R.* v. *Knell*, 1 Barnard. 305; *Smith* v. *Ashley*, 52 Mass. (11 Met.) 367.

[*639] No. 34.

No conscious Publication.—Madness.

"1. The defendant does not admit that he ever spoke or published the words complained of in paragraphs 3 and 4 of the statement of claim.

"2. Throughout the month of April and the early part of May 1879 the defendant was suffering from acute mania, brought on by overwork; he has no recollection of having spoken any such words as alleged either then or at any other time. If, however, the defendant did in fact utter any such words (which he does not admit),

they were not spoken intentionally or maliciously, but solely in consequence, and under the influence, of the said mania; as all who heard the said words then well knew. There is and was no foundation whatever for any such charge; and the defendant unreservedly withdraws all imputation on the plaintiff's character, and exceedingly regrets that he ever spoke the said words (if in fact he did speak them, which he does not admit)."

It may be doubted whether this is a good defence, or only a pleading in mitigation of damages. A somewhat similar plea of drunkenness will be found *post*, No 67. See *ante*, p. 406.

No. 35.

Words spoken in Jest.

Defence to Claim No. 9.

1. The defendant admits that he spoke and published the words set out in paragraph 2 of the statement of claim, but denies that he spoke them with the meaning in that paragraph alleged.

2. The defendant is, and at all times hereinafter mentioned was, clerk to Mr. N., a wholesale baker. The plaintiff is one of Mr. N.'s retail customers. It is and was one of the duties of the defendant as such clerk to call on Mr. N.'s retail customers every Saturday morning and receive the money due for the bread delivered to them in the course of the week.

3. On the morning of Saturday March the 27th 1886 the defendant called upon the plaintiff and took the money for the bread delivered to him during the week. Amongst the change then given [*640] by the plaintiff to the defendant was a counterfeit florin. Neither the plaintiff nor the defendant knew or observed at the time that the florin was counterfeit.

4. Later in the day when the defendant was paying the money over at the office, his employer, Mr. N., discovered that the said florin was counterfeit. The defendant thereupon took the said florin back to the plaintiff's shop, and the plaintiff gave him without demur two good shillings in exchange therefor.

5. On the morning of Saturday May the 8th 1886, when the defendant called on the plaintiff as usual, the plaintiff again gave the defendant a counterfeit florin amongst the money for the bread. And again neither the plaintiff nor the defendant knew or observed at the time that the florin was counterfeit.

6. Again, when the defendant was paying the money over to his employer at the office, Mr. N. discovered that the florin was counterfeit. Thereupon the defendant, recollecting the similar occurrence mentioned in paragraphs 3 and 4 above, exclaimed :—" Why, that's the second bad florin Mr. H. has passed to me within the last six weeks. He's a regular 'smasher'!"

7. The defendant spoke these words as a joke, and never intended seriously to impute to the plaintiff any criminal offence.

8. The only persons who were present at the time or who heard the said words were the defendant's employer, Mr. N., and a fellow-clerk of his, one David Griggs. Both Mr. N. and David Griggs were aware of the circumstances detailed above, and knew to what the defendant was referring, and understood that he spoke in joke, and did not intend to make any serious charge against the plaintiff.

[N.B.—This is a conciliatory line of defence. The plaintiff, if well advised, will at once settle the matter amicably. If he does not, the defendant is almost sure of a verdict. (See *ante*, pp. 106, 108; *Thompson* v. *Bernard* (1 Camp. 48). But sometimes a defendant, if foolish and angry, insists on setting up a more vindictive defence. He denies uttering the words, so as to compel the tell-tale Griggs to come into the box to be cross-examined; and he then proceeds to justify. These tactics will infallibly lead to a verdict for the plaintiff with heavy damages.]

[*641] JUSTIFICATION.

No. 36.

Another Defence to Claim No. 9.

1. The defendant does not admit that he spoke or published the words set out in the statement of claim.

2. The said words are true in substance and in fact. On March 27th 1880 the plaintiff uttered and passed to the defendant a counterfeit florin, well-knowing the same to be counterfeit. On May 8th 1880 the plaintiff uttered and passed to the defendant another counterfeit florin, well-knowing the same to be counterfeit. [*State any other instances in which the plaintiff passed bad coin to the defendant or others.*] Wherefore the defendant says that the plaintiff is a regular "smasher," and has uttered, and has been in the habit of uttering, counterfeit coin, well-knowing the same to be counterfeit; and has been guilty of divers misdemeanours.

No. 37.

Justification of the Words without the alleged meaning.

"3. The defendant denies that he spoke or published the words set out in paragraph 5 of the statement of claim with the meaning therein alleged, or at all with reference to the plaintiff's trade of a builder or his mode of conducting the same, or in any defamatory sense. The said words, without the said meaning, and according to their natural and ordinary signification, are true in substance and in fact. Particulars are delivered herewith. They exceed three folios."

(See *ante*, p. 177.)

No. 38.

Justification of a portion of a Libel.

LEYMAN *v.* LATIMER AND OTHERS, 3 Ex. D. 15, 352 ; 47 L. J. Ex. 470 ; 25 W. R. 751 ; 26 W. R. 305 ; 37 L. T. 360, 819.

DEFENCE.

1. The defendants do not admit that the plaintiff is the proprietor and editor of the *Dartmouth Advertiser* newspaper.

[*642] 2. As to such portion of the said words as alleges that the plaintiff is a felon editor, the defendants say that the same is true in substance and in fact. The plaintiff has been convicted of felony, and was sentenced to twelve months' hard labour for stealing feathers.

3. As to the residue of the said words the defendants say that the same were parts of certain articles printed and published in the defendants' said newspaper, each of which was a fair and *bonâ fide* comment upon the conduct of the plaintiff in his public character as the nominal editor of the *Dartmouth Advertiser*, a public newspaper, and was printed and published by the defendants as and for such comment, and without any malicious motive or intent whatever.

No. 39.

REPLY TO ABOVE DEFENCE.

"1. The plaintiff joins issue upon the 1st and 3rd paragraphs of the defence.

"2. As to the 2nd paragraph of the defence, the plaintiff (so that such admission be not in any way extended or taken to mean that he ever was, in fact, guilty of the offence referred to) admits the allegation therein contained. But the plaintiff further says that he has never been convicted of felony save on that one occasion mentioned in the said paragraph. On that occasion he was convicted of the supposed felony by a Court duly having jurisdiction in that behalf, the Court of Quarter Sessions for the county of Cornwall ; and the said Court in the exercise of such jurisdiction, adjudged that, as a punishment for the said supposed felony, the plaintiff should be imprisoned and kept to hard labour for twelve calendar months. The said conviction took place several years ago, and the plaintiff, as the defendants well knew, duly endured the punishment to which he was so adjudged as aforesaid, for the said supposed felony, and thereby became, and was, and has ever since been, and is, in the same situation as if a pardon under the Great Seal had been granted to him as to the said supposed felony whereof he was convicted as aforesaid."

[*643]

No. 40.

Justification and Privilege.

Defence to Claim No. 1.

1. The defendants admit that the defendant Alice wrote and published the words set out in paragraph 2 of the statement of claim.

2. The said words are true in substance and in fact. While the plaintiff was in the service of the defendants, to wit, on the 18th day of March 1886 she stole two pair of sheets and one counterpane, of goods and chattels of the defendant Henry, and pawned them at the shop of John Smith, No 28 High Street, Evesham ; wherefore the defendants, as they lawfully might, discharged the plaintiff from their service.

3. Subsequently the plaintiff was desirous of entering into the service of Mrs. M., of———, in the county of Warwick ; and Mrs. M. wrote a letter to the defendant Alice inquiring as to the plaintiff's character, and asking especially why she left the defendants' service.

4. Thereupon it became and was the duty of the defendant Alice to write to Mrs. M., telling what she knew as to the plaintiff's character, and stating the reason of her dismissal. In accordance with such duty the defendant Alice wrote to Mrs. M. a letter containing the words complained of. The said words were written in answer to Mrs. M.'s inquiries under a sense of duty and without malice and in the *bonâ fide* belief that the charge therein made was true ; wherefore the defendants say that the said letter is privileged by reason of the occasion on which it was written.

Privilege.

No 41.

Absolute Privilege.—Litigant in Person.

"Before the alleged slander was spoken the plaintiff had issued a writ against the defendant claiming an account, and had taken out a summons in the said action for an account, which on November 12th 1885 came on for hearing before Mr. E. A., the District Registrar for———. The defendant, who is a solicitor, appeared in person before the said Registrar to oppose the said summons, and the said words were spoken, if at all, to the said Registrar in the course of argument during the hearing of the said summons, and are therefore absolutely privileged."

[*644]

No. 42.

Absolute Privilege.— Witness.

The said words were spoken by the defendant whilst in the witness-

box during his examination on oath as a witness in the course of a judicial proceeding before an alderman at Guildhall.

(See *Seaman* v. *Netherclift*, 2 C. P. D. 53 ; 46 L. J. C. P. 128 ; 25 W. R. 159 ; 35 L. T. 784)

No. 43.

Absolute Privilege.—Military Duty.

The said words are part of an official report written by the defendant in accordance with his military duty for the information of his military superiors, and published by him in the discharge of his said duty to such military superiors and not otherwise.

(*Dawkins* v. *Lord Paulet*, L. R. 5. Q. B. 94 ; 39 L. J. Q. B. 53 ; 18 W. R. 336 ; 21 L. T. 584.)

Qualified Privilege.

For a plea of privilege on the ground that the alleged libel was written as a "character" for a servant, see *ante*, Precedent, No. 40.

No. 44.

Answer to Confidential Inquiries.

Defence to Claim No. 5.

"1. The statements contained in the said letter are true in substance and in fact, according to the fair and ordinary meaning of the words used in the said letter.

"2. The publication of the said letter to H., if made, was privileged, and was made *bonâ fide* and without malice. H. having an interest in certain business transactions, in which the plaintiff and the defendant's bank were concerned, made inquiries of the defendant as to the plaintiff, and it was in answer to such inquiries that the publication, if any, of the said letter took place."

[*645] No. 45.

Master and Servant.

"The plaintiffs at the times mentioned in the 4th paragraph of the statement of claim were employed as labourers by a certain Mr. M., who made certain inquiries of the defendant as to the conduct of the plaintiffs and as to certain facts that were within the knowledge of the defendant and were not within the knowledge of the said Mr. M. And it thereupon became and was the duty of

the defendant to state the said facts to the said Mr. M. Such statements are the alleged slanders ; but they were made *bonâ fide* in the discharge of the said duty and in answer to the said inquiries, and in the honest belief that the facts so stated were true and without any malice towards the plaintiffs or either of them ; wherefore the defendant says that they were privileged by reason of the occasion on which they were made."

No. 46.

Advice to one about to marry.

Before and at the time of the alleged grievances the defendant was the son-in-law of the Mrs. Hawkins mentioned in paragraph 3 of the statement of claim. She informed the defendant, as the fact was, that she was about to marry the plaintiff. Thereupon the defendant spoke the said words confidentially to the said Mrs. Hawkins, without malice, and in the honest desire to protect her private interests, and his own. The defendant at the time *bonâ fide* believed in the truth of what he said.

(*Todd* v. *Hawkins*, 8 C. & P. 88 ; 2 Moo. & Rob. 20.)

No. 47.

Communication Volunteered.

2. The defendant was employed by the plaintiff to work at the house of Mrs. M. mentioned in the statement of claim, during her absence from home. Whilst he was so employed, it came to his knowledge that the plaintiff had, in collusion with the servants of the said Mrs. M., removed certain goods of hers from the premises and sold them. It thereupon became the duty of the defendant to [*646] communicate these facts to the said Mrs. M., and he did so on her return, honestly believing that every word he said was true. And the defendant says that these communications are the alleged slanders, if any, and that the same were made *bonâ fide* in the discharge of the said duty, and not maliciously, nor with intent to injure the plaintiff, and were and are therefore privileged.

No. 48.

Offer of Reward for discovery of Offender.

Defence to Claim No. 3.

"The defendant admits the publication of the placard referred to in paragraph 2 of the statement of claim, but denies that the same was false or malicious ; the defendant also denies the alleged mean-

ing, and says that the several matters stated in the said placard are true in substance and in fact, and were published by the defendant for the purpose of endeavouring to discover the person who committed the assault referred to in the said placard, and with the *bonâ fide* object and intention of bringing such person to justice and of prosecuting him to conviction and not otherwise."

No. 49.

Complaint of Plaintiff's Misconduct.

"The plaintiff is the nephew of one of the defendant's tenants, Mrs. B., and at the date of the alleged slander was lodging with her in the house she rented of the defendant. On June 3rd 1886 the defendant, from the hill above his house, saw a young man, whom he then believed to be the plaintiff, jump out of the kitchen window of Mrs. B.'s house and enter an orchard of the defendant's, and commence to steal the defendant's apples. As soon as the defendant approached, the young man ran away. Thereupon the defendant, as he lawfully might do, went to Mrs. B., told her what he had seen, and complained to her of the plaintiff's conduct. This communication and complaint is the alleged slander; and the defendant says that it was privileged by reason of the occasion on which it was uttered. The defendant bore the plaintiff no malice, and honestly believed at the time that what he said was true.

[* 647] No. 50.

Claim of Right.

"5. The defendant's husband died in November 1883, having appointed the plaintiff executor and trustee of his last will. And the plaintiff, as such executor and trustee, took possession of and was proceeding to sell by auction not only the furniture, which was the property of his testator at the time of his death, but also certain other furniture which was the separate property of the defendant. Thereupon the defendant, as she lawfully might do, attended the said auction for the purpose of asserting her claim to her separate property, and of disputing the plaintiff's right to sell the same. And the defendant then spoke and published the said words, if at all, *bonâ fide*, and in the honest belief that they were true, and without any malice towards the plaintiff; wherefore the defendant says that the said words were privileged by reason of the occasion on which they were uttered."

And see Precedent, No. 86, *post*, p. 667.

No. 51.

Reply to No. 50.

"1. The plaintiff joins issue on the defence.

"2. The plaintiff will object that the occasion set forth in paragraph 5 was not and is not shown to have been privileged."

No. 52.

Self-defence.

"The plaintiff in May 1886 published and widely distributed a pamphlet entitled 'The case of Salem Chapel ———.' This pamphlet contained serious charges against the defendant, both personally and as secretary and one of the deacons of the said chapel. Therefore the defendant, as he lawfully might do, published the words set out in paragraph 5 of the statement of claim in reply to the said pamphlet published by the plaintiff, and *bonâ fide* for the purpose of vindicating his character against the plaintiff's attack, and in order to prevent the plaintiff's said charges from operating to his prejudice, and in reasonable and necessary self-defence, and without any malice towards the plaintiff. The said words are therefore privileged."

[* 648] No. 53.

Common Interest.—Church Members.

1. The words set out in paragraph 2 of the statement of claim were part of a requisition summoning a meeting of the members of the English Baptist Church at ———, which was signed by 122 of such members. This requisition was addressed and sent solely to members of the said church, who had a common interest in the matters therein referred to, and was published *bonâ fide* and without malice, and under a sense of duty, and was therefore privileged.

2. The plaintiff subsequently, on Friday December 7th 1883, wrote and published in the said newspaper a long letter attacking the conduct of those who had signed the said requisition, and containing erroneous statements as to their object in convening the said meeting; wherefore the defendant, as he lawfully might do, wrote and published the words set out in paragraph 3 of the statement of claim in answer to the said letter written by the plaintiff, and with the *bonâ fide* intention of explaining the true object of the said meeting, and of correcting the said erroneous statements, and not otherwise. The said words are strictly an answer to the charges made by the plaintiff against the defendant, and the other conveners of the said meeting, and were published without malice

and in reasonable and necessary self-defence, and were and are therefore privileged.

No. 54.

Members of the same Committee.

"The defendant is a Vice-President of the said Association and the said A. B. to whom alone the defendant published the said letter was at the date of such publication the Honorary Secretary of the said Association. The defendant learnt for the first time in the month of January 1886, from the fly-leaf of one of the pamphlets published by the said Association, that the plaintiff had been elected a member of the Executive Committee of the said Association. The defendant *bonâ fide* believed that the plaintiff was not a fit person to occupy that position. Both he and the said A. B. had a common interest in securing that no unfit person should serve on the Executive Committee of the said Association. The defendant also had a right to object to his own name and the plaintiff's appearing together on the said fly-leaf [* 649] as fellow-officers of the same Association. It thereupon became and was his duty to write the said letter to the said A. B., and he wrote it in the honest discharge of said duty and in the *bonâ fide* belief that the statements therein contained were true, and without any malice towards the plaintiff."

No. 55.

Competitors at a Poultry Show.

The plaintiff and defendant are both members of the "Hemel Hempstead Poultry Club," and were competitors at the Annual Show of the club in 1886. Complaints were made during the show of the plaintiff's conduct as such competitor, and eventually several other members lodged a written protest against the plaintiff being allowed to compete. By the rules of the club it was the duty of the committee to investigate this dispute. The said committee wrote to the defendant, who had not signed the protest, and requested him to state to them all he knew or had heard as to the said complaints and as to the other matters referred to in the said protest. Thereupon the defendant in compliance with such request wrote the letter which is the alleged libel. Such letter was written by the defendant without any malice towards the plaintiff and with the sole object of guiding and assisting the said committee in their inquiries, and in the honest belief that every statement therein contained was true, and was a communication made *bonâ fide* on a matter in which the defendant had an interest and in reference to which he had a duty to perform, and was published only to the said committee who had a corresponding interest and duty in that behalf.

No. 56.

Vendor and Purchaser.

Before the publication of the alleged slander the defendant had entered into a written contract to purchase a field from a friend of his, Mr. K. Mr. K. employed the plaintiff as his solicitor to act for him in the matter. The plaintiff unnecessarily delayed the completion of the said purchase and omitted to answer the defendant's requisitions for an unreasonably long time, though both Mr. K. and the defendant [*650] were anxious for a speedy settlement. In consequence of the plaintiff's delay, the date originally fixed for completion passed; and then the plaintiff persuaded Mr. K. to claim from the defendant interest on the purchase-money, which the defendant refused to pay on the ground that his money had for months been lying idle at the bank, and that the matter would have been completed on the day originally fixed, had the plaintiff used reasonable dispatch. This dispute still further delayed the completion of the said purchase, and also greatly increased the amount of the costs which both Mr. K. and the defendant would have to pay their respective solicitors. Both Mr. K. and the defendant had a common interest in keeping down the amounts of the said costs, and in effecting a prompt and amicable settlement of the said dispute, and in the speedy completion of the said purchase. Thereupon Mr. K. wrote a letter to the defendant inquiring as to these matters, and asking especially as to the cause of the unusual delay. It thereupon became and was the duty of the defendant in answering the said letter to state confidentially to Mr. K. his opinion as to the way in which the plaintiff was conducting this business; and in discharge of such duty the defendant wrote and published the letter set out in paragraph 2 of the statement of claim. This letter was published by the defendant to the said Mr. K. alone, and related solely to the said matters in which the defendant and Mr. K. had such common interest as aforesaid, and was written in furtherance of such common interest, and in answer to the said letter from Mr. K., and under a sense of duty, and without malice, and in the *bonâ fide* belief that every word contained in the said letter was true, and not otherwise, and is therefore privileged.

No. 57.

Report of a Judicial Proceeding.

1. The defendant is the proprietor of the ——— *County Gazette.*

2. On the ——— day of ——— 1886 the plaintiff applied to the ——— bench of magistrates for the ——— division of the said county, at a special licensing sessions, for a spirit licence. This application the magistrates refused.

3. On the ——— day of ——— 1886 the defendant published as usual in the said *Gazette* a report of the proceedings before the said magistrates on the preceding day, including an accurate and im-

partial [* 651] account of the plaintiff's application and the reasons stated by the bench for their refusal, which is the alleged libel.

4. Such account was published by the defendant *bonâ fide*, and without malice, and for the public benefit, and in the usual course of the defendant's business and duty as a public journalist, and was and is a correct, fair and honest report of the said proceedings.

No. 58.

A shorter Form.

"The said words formed part of a fair and accurate report of certain proceedings in the Westminster Police Court upon a charge of theft brought against the plaintiff, and were published *bonâ fide* and without malice in the course of the defendant's business as journalist, and are therefore privileged."

No. 59.

Report of a Judgment published as a Pamphlet.

MacDougall *v.* Knight & Son, 17 Q. B. D. 636 ; 55 L. J. Q. B. 464 ; 34 W. R. 727 ; 55 L. T. 274.

"1. The defendants admit that they published of the plaintiff a pamphlet which is a *verbatim* report of the judgment of the Honourable Mr. Justice North, given on the 30th day of June 1884 in the action of *MacDougall* v. *Knight and Son*, and which really gives all the information necessary to be known by anyone feeling an interest in the matter. But the defendants deny that they did so falsely, or maliciously, or that they distributed the said pamphlet broadcast in the city of Bath, or the counties of Somerset and Gloucester, or elsewhere, or at all.

"2. The said pamphlet contained the words set out in paragraph 2 of the statement of claim. The said words were in fact spoken by the Honourable Mr. Justice North in delivering judgment in the said action ; but the defendants do not admit that he or they published the said words with the meanings alleged in the said paragraph.

"3. The defendants are auctioneers and upholsterers carrying on business at Bath, and having a large number of customers resident in Bath and the neighbourhood. The plaintiff brought the said action [*652] against the defendants in the Chancery Division of the High Court of Justice, charging the defendants with breach of contract, misrepresentation and breach of faith. The said action was assigned for trial to the Honourable Mr. Justice North, who after a trial which lasted five days gave judgment in favour of the defendants. The said pamphlet is a fair, accurate and honest report of the said

judgment of the Honourable Mr. Justice North, and was published by the defendants *bonâ fide* and with the honest intention of making known the true facts of the case, and in order to protect their reputation and their said business, and in reasonable self-defence, and without any malice towards the plaintiff."

No. 60.

Report of a Public Meeting privileged by virtue of Sect. 2 of the Newspaper Libel and Registration Act, 1881.

The words set out in paragraph 4 of the statement of claim were printed and published in a newspaper and were part of a report of the proceedings of a public meeting which was lawfully convened for a lawful purpose and open to the public, and such report was fair and accurate and was published without malice, and the publication of the said words was for the public benefit.

It is not sufficient to allege that the publication of the *said report* was for the public benefit (*Pankhurst* v. *Sowler*, 3 Times L. R. 193, *ante*, p. 381).

No. 61.

Reply to above.

The defendant has refused to insert in the newspaper in which the report containing the said words appeared, a reasonable letter or statement of explanation or contradiction by or on behalf of the plaintiff.

[*653] No. 62.

Statute of Limitations.

The alleged cause of action did not accrue within six years before this suit.

Or in the case of slander actionable per se:

The words complained of were not spoken within two years before this suit. (*See ante*, p. 520.)

Or,

The defendant will rely upon the Statute of Limitations (21 Jac. I. c. 16).

No. 63.

Previous Action.

The plaintiff heretofore, to-wit, on the ——— day of ——— 1887 (date of writ), sued the defendant in the ——— Division of this

Honourable Court, for the same cause of action as is alleged in the statement of claim herein; and such proceedings were thereupon had in that action that the plaintiff afterwards by the judgment of the said court recovered against the defendant £——— for the said cause of action, and his costs of suit in that behalf; and the said judgment still remains in force. [*State in the margin of the plea the date when such judgment was signed, and the number of the roll in which such proceedings are entered.* (Reg. Gen. Hilary Term, 1853, r. 10.)]

A plea that judgment was recovered against a joint publisher will also be a bar to an action against the others for the same publication. (*Ante*, p. 522; *and see form of plea in* Duke of Brunswick *v.* Pepper, 2 C. & K. 683, n.)

A plea that in a former action judgment was given against the plaintiff, is really a plea in estoppel. Commence as above.

And such proceedings were thereupon had in that action that afterwards and before this suit it was adjudged that the plaintiff should recover nothing against the defendant, and that the defendant should recover against the plaintiff £——— for his costs of defence. The said judgment was signed on the ——— day of ——— 1887, and still remains in force. [The proceedings are entered on roll, No. ———.] Wherefore the defendant says that the plaintiff is estopped, and ought not to be admitted to bring the present action against the defendant.

[*654] No. 64.

Accord and Satisfaction.

The plaintiff was the proprietor and publisher of a certain weekly journal called the "Musical Review"; and the defendant was the proprietor and publisher of another weekly journal called the "Orchestra." And after the publication, if any, of the said words the plaintiff and defendant agreed together to accept certain mutual apologies, to be published by the plaintiff and defendant respectively in their said weekly journals, in full satisfaction and discharge of all the causes and rights of action in the declaration mentioned and all damages and costs sustained by the plaintiff in respect thereof. And thereupon, in pursuance of the said agreement, the defendant did on the 14th of May, 1864, print and publish his part of the said mutual apologies in the form agreed on in his weekly journal, the "Orchestra," of which the plaintiff had notice. And the plaintiff did also after the making of the said agreement and in pursuance thereof, to-wit, on the 14th of May, 1864, print and publish his part of the said apologies in the form agreed on in his said weekly journal, the "Musical Review." And such apologies so published as aforesaid the plaintiff accepted and received in full satisfaction and discharge of the causes of action set out in the statement of claim.

See *Boosey* v. *Wood*, 3 H. & C. 484; 34 L. J. Ex. 65.

No. 65.

Another Form.

MARKS *v.* CONSERVATIVE NEWSPAPER CO., LIMITED, 3 Times L. R. 244.

"2. On the 18th day of June, 1886, and before the commencement of this action the plaintiff agreed with the defendants that if the defendants would publish in the said "Evening News" a letter written by the plaintiff and contradicting the statements made in the alleged libel, he, the plaintiff, would accept the publication of such letter in full satisfaction and discharge of any claim which he might have against the defendants.

"3. The defendants in pursuance of such agreement did on the said 18th day of June, 1886, publish such letter as aforesaid, and the plaintiff accepted such publication in full satisfaction and discharge of the alleged cause of action."

[*655] No. 66.

Payment into Court.

WELDON *v.* ROUTLEDGE & SONS.

"Defendants admit that they are liable in damages to plaintiff in respect of the matter in question, and pay into court the sum of £26 5*s.* in full satisfaction of plaintiff's claim, but they do not admit that the words published are capable of bearing the innuendoes put upon them by plaintiff in her statement of claim."

No. 67.

Words spoken by the Defendant when Drunk—Payment into Court and Apology.

DEFENCE.

"The defendant brings into court the sum of £5, and says that the same is sufficient to satisfy the plaintiffs' claim in this action.

Particulars.

The defendant proposes to give evidence at the trial of the following matters, with a view to mitigation of damages :—

The defendant was a total stranger to both plaintiffs and bore no malice to either. He was drunk when he uttered the said words, and the fact that he was drunk was obvious to all who heard them. He has no recollection of having ever uttered any such words, but does not dispute that he did so. Everyone who heard what the defendant said was fully aware that he was not speaking deliberately and that he did not seriously mean to make any charge against

either plaintiff, but was talking wildly in consequence of drink. The said words are wholly untrue. There is and was no foundation whatever for any such statement. The defendant exceedingly regrets that he should ever have uttered any such words; he unreservedly withdraws all imputation on the plaintiffs' character, and apologizes for the abusive language which he uttered without any reason while under the influence of liquor.

(Signed)

Delivered, &c."

[N.B.—These particulars are not delivered under Order XXXVI. r. 37, but are part of the pleading; see *ante*, p. 542.

[*656] No. 68.

Payment into Court and Particulars under Order XXXVI. r. 37.

1. The defendants admit that they sold and circulated the book called "————," and that the same contained the words set out in paragraph 3 of the statement of claim. They deny that the said words are capable of the meanings alleged in the innuendoes contained in the said paragraph, but they admit that the said words are libellous, and that they refer to the plaintiff.

2. The defendants bring into court the sum of £———, and say that the same is sufficient to satisfy the plaintiff's claim in this action.

(Signed)

Particulars.

Delivered pursuant to Order XXXVI. r. 37.

Take notice that at the trial of this action the defendants intend to give the following matters in evidence with a view to mitigation of damages :—

[N.B.—There is nothing to prevent such particulars being printed on the same piece of paper as the defence, if the defendant wishes it.]

No. 69.

Pleading an Apology.

Defence.

"1. The defendant by the words set out in the statement of claim did not mean or imply that the plaintiff had in any way been guilty of fraudulent or dishonest practices, nor was he so understood by anyone who heard him. The said words do not bear any such meaning as is alleged in paragraph 8 of the statement of claim.

"2. The defendant has paid into court the sum of fifteen guineas,

and says that the same is sufficient to satisfy the plaintiff's claim in this action.

"3. At the earliest opportunity after the commencement of this action the defendant made and offered an apology to the plaintiff for the said words by means of a letter written by the defendant's solicitors to the plaintiff's solicitor in the following words :—

[*Here set out letter with date.*]

[*657] "4. On the 31st day of October 1882 the defendant caused to be printed in the ——— Journal the following apology to the plaintiff for the said words :—

APOLOGY.*

I, ——— of ——— desire to express my sincere regret that I incautiously repeated a statement made to me by one of my father's clerks concerning Mr. K. of ———. Such statement now proves to have been wholly unfounded, and I beg to withdraw and contradict the same, and to apologize to Mr. K. for having made it.

An action having been commenced against me by Mr. K. for slander, I have this day paid into Court the sum of £15 15*s.*, and I trust that Mr. K. will accept that sum, together with this apology, as the best amends it is in my power to make for the injury or annoyance which I have inadvertently caused him.

Dated this 25th day of October 1882.

(Signed)
[*Defendant.*]

Witness,
A. B.,
Solicitor.

"This apology also appeared in the issue of the said journal for November 7th, and will appear in the next four consecutive issues thereof.

"5. Take notice that the defendant intends on the trial of this action to give in evidence in mitigation of damages the matters alleged in paragraphs 3 and 4 above."

* The jury at the trial found this apology sufficient.

No. 70.

REPLY TO ABOVE DEFENCE.

"1. The plaintiff joins issue upon the defence, except so far as it admits any part of the statement of claim.

"2. The plaintiff as to paragraph 2 of the defence, says that the said sum alleged as paid into court by the defendant is not enough to satisfy the claim of the plaintiff.

"3. In answer to paragraph 4 of the defence the plaintiff says that [*658] he never agreed to accept the apology set out in the said

paragraph ; but the same was inserted in the ——— Journal without his knowledge or consent, and on the 31st October 1882, being three months after the plaintiff had complained to the defendant of the slanderous words mentioned in the statement of claim. The so-called apology is evasive, indefinite, insufficient and useless, and is not in fact any compensation or amends whatever for the slanderous words complained of."

No. 71.

Notice under the 6 *&* 7 *Vict. c.* 96, *s.* 1.

1886.—B.—No. 732.

In the High Court of Justice,
Queen's Bench Division.
Between *A.B.* . . Plaintiff,
and
E.F. . . Defendant.

Take notice, that the defendant intends on the trial of this cause to give in evidence in mitigation of damages, if any shall be found to be due, that he made [*or* offered] an apology to the plaintiff for the defamation complained of in the statement of claim herein, before the commencement of this action [*or* as soon after the commencement of this action as there was an opportunity of making or offering such apology, the action having been commenced before there was an opportunity of making or offering such apology]. Such apology was published by the defendant in the ——— News for the ——— day of ——— 18—.

Yours, &c.,
G.H., defendant's solicitor [*or* agent].

To Mr. *C.D.*, plaintiff's
solicitor or agent.

No. 72.

Plea under Sect. 2 *of* 6 *&* 7 *Vict. c.* 96.

The alleged libel was contained in a public daily newspaper called the ——— Daily Press, and was inserted in such newspaper without [*659] actual malice and without gross negligence. Before [*or* At the earliest opportunity after] the commencement of this action the defendant inserted in several issues of the said newspaper a full apology for the said libel according to the statute in such case made and provided ; and the defendant immediately after the commencement of this action paid the sum of forty shillings into Court in the said action by way of amends for the injury sustained by the plaintiff for the publication of the said libel, and gave notice of such payment into Court to the plaintiff. And the defendant says that the said sum is enough to satisfy the claim of the plaintiff in respect of the said libel.

Interrogatories and Answers.

No. 73.

Interrogatories in an Action against a Newspaper Proprietor (allowed in Lefroy *v.* Burnside, 4 L. R. (Ir.) 340; 41 L. T. 199; 14 Cox, C. C. 260; *ante*, p. 553).

"Interrogatories on behalf of the above-named plaintiff for the examination of the above-named defendant:—

1. Is it not the fact that in the said newspaper published on the 6th day of July 1878, or some other and what date, an article appeared in the words and figures set forth in the sixth paragraph of the statement of claim in this action? If not how otherwise?

2. Were not you, the defendant William Burnside, upon and before the said 6th day of July 1887, or some other and what date, the proprietor, either alone or jointly with some other and what person or persons, of the said newspaper?

Note.—The defendant must answer the above interrogatories on oath within ten days.

Delivered the ——— day of ———, by, &c."

No. 74.

"*Interrogatories on behalf of the Plaintiff to be answered by an Officer of the 'Leeds Daily News Company (Limited)' and by the defendant William Lauries Jackson.*

1. Is the defendant William Lauries Jackson the *editor or* publisher of the 'Leeds Daily News,' *and what position does he occupy in respect of the said newspaper?*

[*660] 2. Is the said William Lauries Jackson a shareholder in the said company?

3. Is it the duty of the said William Lauries Jackson to exercise a supervision over paragraphs of the nature of those set out in the statement of claim?

4. *Did the said William Lauries Jackson write, or have anything to do with the writing of, any and which of the paragraphs mentioned in the statement of claim: and, if not, who was the writer of such paragraphs, and of each of them?*

5. *Did the said William Lauries Jackson see any and which of the said paragraphs before they were inserted in the newspaper or before the newspaper was published or circulated, and did he sanction the publication of the said paragraphs, or of any and which of them?*

6. By whom, and in what way, were the said paragraphs brought to the office of the newspaper company; or were they received by anyone else, and whom, on their account, at one time; and, if not, when were they received?

7. Were the numbers of the 'Leeds Daily News' of the 13th August 1875, 19th August 1875, 10th September 1875, and the

numbers of the 'Leeds Daily News' containing the paragraph commencing with the word 'Query,' printed and published by the Leeds Daily News Company (Limited) or by the defendant William Lauries Jackson or by both of them?"

[The words in italics were struck out by Archibald, J., at Chambers, and the rest allowed, on January 8th 1876. See Weekly Notes for 1876, p. 11; 1 Charley, 101; Bitt. 91; 20 Sol. J. 218; 60. L. T. Notes, 196.]

No. 75.

BEDFORD *v.* COLT.

Interrogatories.

"1. Did you write or cause to be written the letter to the editor dated 23rd November 1881, published in the 'Hereford Times' of 26th November 1881, under the heading of 'The distraint for rent case at Leominster,' and signed by your name T. A. Colt?

"2. By your allegation in that letter that one of the holders of the bill of sale mentioned in your letter had affirmed sometime since in a court of law that he did not possess a £5 note, did you intend to refer to the plaintiff or to Mr. George Bedford, the proprietor of the Royal Oak Hotel in Leominster?"

[*661] No. 76.

Answer.

"In answer to the first and second of the said interrogatories, I say that I object to answer the same, on the ground that the same cannot legally be asked by way of interrogatories, and also upon the grounds that they seek discovery of evidence which relates exclusively to my case, and that such discovery is not sufficiently material at this stage of the action."

[This answer was held insufficient by the Divisional Court, Grove and Lopes, JJ., on the authority of *Allhusen* v. *Labouchere*, (C. A.) 3 Q. B. D. 654; 47 L. J. Ch. 819; 48 L. J. Q. B. 34; 27 W. R. 12; 39 L. T. 207, and the defendant was ordered to file further and better answers (May 4th, 1882).]

No. 77.

Interrogatories in JONES *v.* RICHARDS, 15 Q. B. D. 439.

"1. Did you, on or about the 16th of February 1885, or at some other and what date, write and send or cause to be sent to Colonel Pryse, of &c., a letter of which a copy is annexed hereto, marked A, of which the original will, if you require it, be shown to you before

swearing your affidavit in answer to these interrogatories, on your giving reasonable notice in that behalf?

"2. Did you on or about the 26th of January 1885, or at some other and what date, write and send or cause to be sent a letter of which a copy is annexed marked B [the latter containing the alleged libel], of which the original will, if you require it, be shown to you before swearing your affidavit in answer to these interrogatories, on your giving reasonable notice in that behalf?"

No. 78.

Answers thereto.

"1. I object to answer the interrogatory numbered 1, on the ground that the same is irrelevant for the purposes of this action.

"2. I object to answer the interrogatory numbered 2, on the ground that I am advised and believe that my answer thereto might tend to criminate me."

[The court held the answer to the first interrogatory insufficient, the question being relevant as leading up to a matter in issue in the cause; see *ante*, p. 547.]

II. PRECEDENTS OF PLEADINGS IN ACTIONS FOR SLANDER OF TITLE.

[*662]

No. 79.

Libel on goods manufactured and sold by another.

Western Counties Manure Co. *v.* Lawes Chemical Manure Co. (L. R. 9 Ex. 218 ; 43 L. J. Ex. 171 ; 23 W. R. 5 ; *ante*, p. 149.)

Declaration.

"In the Exchequer of Pleas.

The 3rd day of February, A.D. 1874.

Devonshire to wit.

The Western Counties and General Manure Co., Limited, by William Harris, their attorney, sue the Lawes Chemical Manure Co., Limited, for that at the time of the committing of the grievances hereinafter mentioned the plaintiffs carried on business, and still do carry on business, as amongst other things manufacturers of and sellers of artificial manures, and had and still have upon sale certain artificial manures, and the plaintiffs say that the defendants well knowing that the plaintiffs were carrying on the aforesaid business and selling the said artificial manures, and contriving and intending to injure the plaintiffs in their said business, falsely and maliciously printed and published and caused to be printed and published of and concerning the plaintiffs, and of and concerning them as such manufacturers and sellers of artificial manures, and of and concerning them in the way of their said business, the words following, that is to say :—[*For the words of the libel, see the report of the case*] ; meaning thereby that the said artificial manures so manufactured sold and traded in by the plaintiffs were artificial manures of an inferior quality to the said other artificial manures and especially were of an inferior quality to the said artificial manures of the defendants ; whereas in truth and in fact the said artificial manures so manufactured, sold and traded in by the plaintiffs were not of an inferior quality and especially were not inferior in quality to the said artificial manures of the defendants *as the defendants well knew ;** and by reason of the premises certain persons and particularly George Snell and A. Rowe who before [*663] and at the time of the committing of the grievances hereinbefore mentioned had been used to buy the said artificial manures so manufactured, sold and traded in by the plaintiffs ceased to do so, and certain other persons and particularly Geo. May and Samuel Harvey who

* The words in italics were subsequently struck out by consent.

would have bought the said artificial manures of the plaintiffs were induced to refrain from buying the same; whereby the plaintiffs have been prejudiced and injured in their said trade and business, and the reputation of the said artificial manures so manufactured by the plaintiffs has been injured, and the sale thereof has been much diminished and fallen off, and the plaintiffs have been greatly injured in their credit, reputation and circumstances, and have been and are thereby prevented from acquiring divers great gains which they might and otherwise would have acquired.

And the plaintiffs claim £2,000."

No. 80.

Pleas.

"In the Exchequer of Pleas.

"The 23rd of February 1874.

"1. The defendants by Arthur P. Power their attorney say that they are not guilty.

"2. And for a second plea, the defendants say that the alleged words are true in substance and in fact.

"3. And for a third plea, the defendants deny the allegations in the declaration contained that the said artificial manures manufactured, sold and traded in by the plaintiffs were not inferior in quality to the said artificial manures to the defendants' knowledge, as alleged."

Feb. 23 1874.

Order by Master George Pollock, giving the defendants leave to plead the several matters. Plaintiffs to be at liberty to demur to the third plea. Particulars of the second plea to be delivered within three days.

[*664] No. 81.

Replication.

"Feb. 27 1874.

"The plaintiffs join issue upon all the defendants' pleas.

"And the plaintiffs say that the defendants' third plea is bad in substance.

[*In Margin.*]

"A matter of law intended to be argued is that the defendants' knowledge that the plaintiffs' manures were not inferior to their own is immaterial, and that the plea is therefore no answer to the action."

No. 82.

Lawes, &c. Co. ats. *Western, &c. Co.*

Joinder in Demurrer.

"Feb. 28 1874.

"The defendants say that the said third plea is good in substance."

No. 83.

Points.

"The following are the points intended to be insisted on by the plaintiffs upon the argument of this demurrer :—

"1. That the defendants' third plea is bad in substance.

"2. That the defendants' knowledge that the plaintiffs' manures were not inferior to their own is immaterial, and that the plea is therefore no answer to the action.

"3. That the declaration is good without the allegations denied in the third plea."

Subsequently, for convenience sake, and by agreement between the counsel for the parties respectively, the plaintiffs amended their pleadings by striking out the averment "as the defendants well knew," and the defendants withdrew their third plea and demurred to the declaration instead. This demurrer was decided in favor of the plaintiffs, and the case was subsequently settled without going to trial. A *Stet Processus* was entered on October 9th, 1874.

[*665] No. 84.

Interrogatories.

"Interrogatories to be answered by the secretary or manager or some other person on behalf of the defendants, by affidavit in writing, to be sworn and filed in the ordinary way pursuant to the order of the Hon. ———, dated the ——— day of ———, A.D. 1874.

"1. Was one W. M. W. an agent or servant, or in the employ of the defendants in or about the month of February 1873, for the sale of their manures, or for any other purpose, in Plymouth or elsewhere, in the county of Devon, or in the county of Cornwall ?

"2. Was any, and what, inquiry made by the said W. M. W. of J. M., then the secretary of the Devon and Cornwall Chambers of Agriculture, in or about the month of February 1873, respecting certain manures sent by the said J. M., for analysis, to Professor A.? Was the said inquiry, if any, made by the express authority of the defendants, or would it have been within the general authority of the said W. M. W. to make such inquiry ? Did the said J. M., either then or at any time, give any, and what, accounts to the defendants or the said W. M. W., or any of their agents or servants, of the

circumstances under which, the time when, the place where, and the person or persons from whom he had procured the said manures, or samples of manures?

"3. Were the said manures, or samples of manures, forwarded to Professor A. by the authority of the defendants, or their agents or servants, or which of them?"

"4. Was the said J. M., in or about the month of February 1873, or at any other and what time, and for how long, and where, an agent or servant of, or in any way as a shareholder, customer, or otherwise connected with the defendants?

"5. Did the defendants receive, in or about the month of February 1873, or at any other and what time, from the said J. M., an analysis, or copy of an analysis, made, or purporting to be made, by Professor A. of certain manures, or samples of manures? Did the said J. M., give to the defendants, their agents or servants, any, and what, account of the time when, the place where, and the person or persons from whom he received, or became possessed of, the said analysis?

"6. Were the manures sold or manufactured by the plaintiff among the manures so analysed, or purported to be analysed? Did the defendants print or circulate the said analysis?

"7. Did the defendants send a copy of the said analysis to each or [*666] any, or either of their agents, and to which of them? Give the names and addresses of the said agents.

"8. Was one E. E., in or about the month of February 1873, or at any other and what time, an agent of, or in any way as a shareholder or customer, or otherwise, connected with the defendants? Did he, by the authority or with the sanction of the defendants, procure from the plaintiffs, in or about the month of December 1872, or when, any, and what samples of their manures? What was done with the samples, if any, so obtained?

"9. Have the defendants in their possession or power any of the manures or samples, or portions of the manures or samples, submitted for analysis to Professor A.?"

10. *Formal interrogatory as to books, letters, documents, &c.*

No. 85.

Slander of Title to Goods.

C. v. *D.*

STATEMENT OF CLAIM.

1. The plaintiff, at all the times hereinafter mentioned, was a stone-mason and contractor carrying on business at ———, in the county of ———.

2. On or about the ——— day of ——— 1880 the plaintiff in the ordinary course of his business advertised certain goods of his

for sale. The following is a copy of the advertisement :—"To be sold by auction, by Mr. F. S., on Friday and Saturday, January 30th and 31st 1880, at the above works, the whole of the working plant, the property of Mr. E. C., consisting of, &c. [*The advertisement then described a variety of articles, waggons, carts, sleepers, planks, and materials.*] The sale to commence each day at twelve o'clock. Cotsgate Hill, Ripon, January the 19th 1880."

3. Thereupon the defendant on the 25th day of January 1880 falsely and maliciously caused to be printed and published of the plaintiff and in relation to the said intended sale the following "Notice," that is to say :—[*here set out the words verbatim*] ; thereby meaning and intending to cause it to be believed that the goods named in the said advertisement were the property of the defendant and not of the plaintiff, and that no person could safely purchase any goods to be exposed for sale at the said advertised sale.

4. By means of the publication of the said "Notice" X., Y. [*667] and Z., all of ——— in the said county, who were desirous of purchasing the said goods or some of them, and who would otherwise have attended at the said sale, and would have bidden for and purchased the said goods or the greater part of them, were prevented from attending at the time and place appointed for the sale, and were deterred from bidding at such sale, and declined to purchase the said goods or any part thereof ; and the plaintiff was then prevented from putting up the said goods for sale, and was unable to procure a fair and reasonable price for the same, and the said intended sale failed altogether ; and the expenses incurred by the plaintiff in advertising and otherwise preparing for the said intended sale were thrown away ; and the plaintiff lost the profits he would have made by the sale of his said goods and was otherwise much injured and damnified.

And the plaintiff claims, &c.

No. 86.

C. v. *D.*

Defence.

1. The defendant admits that the plaintiff caused to be printed the advertisement set out in paragraph 2 of the Statement of Claim ; but denies that the goods mentioned in such advertisement were the property of the plaintiff, and that the intended sale by auction was in the ordinary course of the plaintiff's trade and business.

2. The defendant admits that he caused to be printed and published the "Notice" set out in paragraph 3 of the Statement of Claim ; but denies that he did so with the meaning in such paragraph alleged.

3. Before and at the time of the publication complained of, the plaintiff unlawfully detained from the defendant certain timber, carts, rails, plant and materials, the property of the defendant. The

defendant was informed and believed that the plaintiff intended to dispose of the same (among other things) at the said intended sale by auction. The defendant accordingly printed and published the said "Notice" for the purpose of warning all persons from purchasing the said goods and chattels so unlawfully detained by the plaintiff as aforesaid and in the *bonâ fide* belief that such warning was necessary for the protection of the defendant's own property, and without any malice towards the plaintiff.

See *Carr* v. *Duckett*, 5 H. & N. 783 ; 29 L. J. Ex. 468.

[*668] No. 87.

Libel in the nature of Slander of Title.

Hart and Another *v.* Wall (2 C. P. D. 146 ; 46 L. J. C. P. 227 ; 25 W. R. 373).

Statement of Claim.

"1. The plaintiffs were at the times hereinafter mentioned, and still are, vocalists, and had been and were engaged to sing at the 'Sun Music Hall,' Knightsbridge, and also at the 'London Pavilion Music Hall,' for reward payable to the plaintiffs for their services, and they appeared and sang in public under the name of 'The Sisters Hartridge.'

"2. On the 15th January 1876 the defendant falsely and maliciously wrote and published of the plaintiffs, in the form of a letter addressed to E. Williams, Esq., the proprietor of the 'Sun Music Hall,' of the plaintiffs and of them as such vocalists, and of their engagement at the 'Sun Music Hall,' the words following, that is to say :—'January 15th 1876. E. Williams, Esq. My dear Sir,—Although I know it is quite unintentional on the part of the lady advertisers (meaning the plaintiffs), the advertisement attached at foot, if relied upon in every particular by proprietors engaging them, is calculated to lead such proprietors to incur the penalties under the Copyright Act in certain cases, as I hold the power of attorney over the performing rights of certain musical publications belonging to two houses therein named, who only have the copyrights vested in them, and a separate and distinct property never held by them. If all proprietors knew this, it would be best ; but I have not time to apprise them. I remain, yours truly, H. Wall ;' meaning that the plaintiffs had no right to sing certain songs which they advertised themselves as about to sing at the said music hall.

"3. In consequence thereof, and by the publication of the said words, E. Williams dismissed the plaintiffs from his service and terminated the said engagement at the 'Sun Music Hall.'

"4. On the 19th of January 1876 the defendant falsely and maliciously wrote and published of the plaintiffs, in the form of a letter addressed to E. Loibl, Esq., the proprietor of the 'Pavilion

Music Hall,' of the plaintiffs, and of them as such vocalists, and their engagements at the said music hall, the words following, that is to say:—'January 19th 1876. E. Loibl, Esq. Dear Sir,—That you may not be misled, I beg to state that, with reference to an [*669] advertisement in the last *Era*, where the Misses Hartridge (meaning the plaintiffs) give notice that they have received unhesitating permission to perform any *morceaux* from any publication of certain publishers therein mentioned, it would be as well for you to know that, if two of the firms really had pretended to have given such unqualified sanction, that I hold powers of attorney over certain publications issued by them as to the sole liberty of public performance, which right they never possessed. But Messrs. Chappell & Co.'s representative to-day informed me that they only granted permission for two songs in particular (which were named), and they were not aware it was for music-hall singing, as they have a poor opinion of such creating any demand for their publications; and moreover that they require the advertisement to be altered. And Messrs. Metzler & Co.'s representative, in the presence and hearing of Mr. Brown (the head man of Mr. Cunningham-Boosey), yesterday stated to me that he had granted no permission whatever, but on the contrary, that they had informed the ladies (meaning the plaintiffs) that their charge for such permission would be 7*s.* per night (£2 2*s.* per week,) as much again as Messrs. Boosey named,' (meaning that the plaintiffs had advertised themselves to sing at the said music-hall songs which they had no right to sing).

"5. In consequence of the publication of these words E. Loibl dismissed the plaintiffs from his service, and dispensed with their services and refused to employ them to sing at the said music hall; and the plaintiffs were and are by means of the premises otherwise injured.

"And the plaintiffs claim £100 damages."

III. FORMS OF PLEADINGS, NOTICES, ETC., IN THE COUNTY COURT.

[*670]

No. 88.

(County Court Rules, 1886.—Appendix, Form 75.)

Statement of Plaintiff's Cause of Action in Actions of Libel or Slander remitted for trial in a County Court.

In the County Court of ———, holden at ———.

Between *A. B.* Plaintiff,
[*address and description*],

and

C. D. Defendant,
[*address and description*].

Being an action of libel [*or* slander] commenced in Her Majesty's High Court of Justice, and remitted by order of a Judge [*or* Master *or* District Registrar] thereof under sect. 10 of the County Courts Act, 1867, to be tried in this court.

Libel.

This action is brought :—

For that the defendant falsely and maliciously wrote and published of and concerning the plaintiff the words following : " *He is a liar, a blackguard and a scoundrel;* " and the plaintiff claims £200 damages.

Libel of the Plaintiff in the way of his Trade.

Or, For that the defendant falsely and maliciously caused to be printed and published of and concerning the plaintiff in the way of his trade as a grocer the words following: *Mr. A. B. sands his sugar and dusts his pepper*," whereby the plaintiff was injured in his trade, and lost the custom of several persons, particularly X., Y., and Z., who had before dealt at the plaintiff's shop; and the plaintiff claims £50 damages.

Slander.

Or, For that the defendant falsely and maliciously spoke and published of and concerning the plaintiff the words following : " *A. B. is a thief and stole Mrs. Brown's ducks;* " and the plaintiff claims £30 damages.

Slander of Plaintiff in the way of his Calling.

Or, For that the defendant falsely and maliciously spoke and published of and concerning the plaintiff, in the way of his business and calling as a ratcatcher, the words following : " *A. B. is a great* [*671] *rogue, and instead of doing his best to kill the rats he encourages the breed, so that he may have more employment from the*

farmers," whereby the plaintiff was injured in his business, and several farmers, particularly X., Y., and Z., who had usually employed him to kill the rats on their farms, ceased to do so; and the plaintiff claims £20 damages.

Above is the statement of the plaintiff's cause of action.

Dated this ——— day of ———, 18—.

A. B., plaintiff,
or
E. T., plaintiff's solicitor.

To the registrar of the court,
and to the defendant.

[*N. B.—The above Forms are only given as examples; and the statement of the plaintiff's cause of action must in all cases be according to the facts, and be as concise as possible.*]

No. 89.

(County Court Rules, 1886.—Appendix, Form 76.)

Notice of Trial of Action of Libel or Slander remitted for trial in a County Court.

Being an action of libel [*or* slander] commenced in the High Court of Justice, and remitted by order of a Judge thereof [*or* Master *or* District Registrar], under sect. 10 of the County Courts Act, 1861, to be tried in this court.

Take notice that this action will be tried at a court to be holden on the ——— day of ———, at — o'clock in the forenoon.

[*N. B.—To the notice sent to the defendant the registrar must annex a copy of the statement of the plaintiff's cause of action.*]

No. 90.

(County Court Rules, 1886.—Appendix, Form 95.)

Notice of Special Defence.

Take notice that the defendant intends at the hearing of this action to give in evidence and rely upon the following ground of defence:

Dated this ——— day of ———, 18—.

The defendant [*or* Defendant's solicitor.]

To the registrar of the court.

[*672] *Justification.*

That the libel [*or* slander] complained of is true in substance and in fact.

[*N. B.—Notices of Special Defence, in cases commenced in a Superior Court, and sent to the County Court for trial under sect.* 10 *of* 30 & 31 *Vict. c.* 142, *must have, in addition to the usual headings, the special headings provided for those cases*]

No. 91.

(County Court Rules, 1886.—Appendix, Form 96.)

Notice to be given by the Defendant under 6 & 7 *Vict. c.* 96, *s.* 1, *in an Action for Libel or Slander remitted for trial in a County Court.*

Being an action for libel [*or* slander] commenced in the High Court of Justice, and remitted by order of a Judge [*or* Master *or* District Registrar] thereof under sect. 10 of the County Courts Act, 1867, to be tried before this court.

Take notice that the defendant on the trial of this action will give in evidence in mitigation of damages that he made [*or* offered an apology to the plaintiff for the libel [*or* slander] complained of before the commencement of the action, [*or* as soon after the commencement of the action as he had an opportunity of so doing.]

To the registrar of the court
and to the plaintiff.

No. 92.
(County Court Rules, 1886—Appendix, Form 97.

Notice to be given by defendant under 6 & 7 *Vict. c.* 96, *s.* 2, *in an Action for Libel remitted for trial in a County Court.*

Being an action for libel commenced in the High Court of Justice, and remitted by order of a Judge [*or* Master *or* District Registrar] thereof under sect. 10 of the County Courts Act, 1867, to be tried before this court.

Take notice, that the defendant on the trial of this action will give [*673] in evidence and rely upon the following ground of defence ; (that is to say,)

That the libel was inserted in the newspaper called or known by the name of ——— without actual malice and without gross negligence, and that before the commencement of the action [*or* as soon after the commencement of the action as he had an opportunity of doing so] the defendant inserted in the said newspaper [*or* offered

to publish in any newspaper or periodical publication to be selected by the plaintiff] a full apology for the said libel, and that the defendant has paid into court £——— by way of amends for the injury sustained by the plaintiff by the publication of the said libel.

Dated this ——— day of ———, 18—.

C. D., defendant,
or
E. F., defendant's solicitor.

To the registrar of the court
and to the plaintiff.

[*N. B.—If the libel was published in any periodical publication other than a newspaper, alter the notice accordingly.*]

IV. PRECEDENTS OF CRIMINAL PLEADINGS.

No. 93.

Information for a Libel on a private Individual.

R. *v.* NEWMAN (1 E. &. B 268, 558 ; 22 L. J. Q. B. 156 ; 17 Jur. 617 ; 3 C. & K. 252 ; Dears. C. C. 85).

"In the Queen's bench.

"Michaelmas Term, 15 Vict., A. D. 1851.

"Middlesex to wit.

"Be it remembered, that C. F. Robinson, Esq., coroner and attorney of our Lady the Queen in the Court of Queen's Bench, who prosecutes for our said Lady the Queen in this behalf, comes here into the said Court at Westminster, the 21st day of November, in the fifteenth year of the reign of our said Lady, and gives the Court to understand and be informed that John Henry Newman, doctor of divinity, late of the parish of Aston, in the county of Warwick, contriving and wickedly and maliciously intending to injure and [*674] vilify one Giovanni Giacinto Achilli, and to bring him into great contempt, scandal, infamy, and disgrace, on the 1st of October A. D. 1851, did falsely and maliciously compose and publish a certain false, scandalous, malicious, and defamatory libel, containing divers false, scandalous, malicious, and defamatory matters concerning the said Giovanni Giacinto Achilli, that is to say :—[*Here follows the libel, set out verbatim with the necessary innuendoes*]. Which said false, scandalous, malicious, and defamatory libels, the said John Henry Newman did then publish to the great damage, scandal, and disgrace of the said Giovanni Giacinto Achilli, in contempt of our said Lady the Queen, to the evil and pernicious example of all others in like case offending and against the peace of our said Lady the Queen, her crown and dignity. Whereupon the said coroner and attorney of our said Lady the Queen, who for our said

Lady the Queen in this behalf prosecuteth, prayeth the consideration of the Court here in the premises, and that due process of law may by awarded against the said John Henry Newman in this behalf to make him answer to our said Lady the Queen touching and concerning the premises aforesaid."

See Crown Office Rules, 1886, Form, No. 30.

For a precedent of an information for a libel on a body or class of persons, see *R.* v. *Gathercole*, 2 Lewin, C. C. pp. 238—253.

No. 94.

*Pleas to the above Information.**

"In the Queen's Bench.

"Michaelmas Term, 15 Vict., A. D. 1851.

"1. And the said John Henry Newman appears here in Court by Henry Lewin, his attorney, and the said information is read to him, which being by him heard and understood, he complains to have been grievously vexed and molested under colour of the premises, and the less justly because he saith that he is Not Guilty of the said supposed offences in the said information alleged, &c.

"2. And for a further plea, the said John Henry Newman saith [*675] that before the composing and publishing of the said alleged libel, to wit, on the 1st of January 1830, &c. : [*Here follow facts showing the truth of the matters charged.*] And so the said John Henry Newman says that the said alleged libel consists of allegations true in substance and in fact, and of fair and reasonable comments thereon.

"And the said John Henry Newman further saith, that at the time of publishing the said alleged libel, it was for the public benefit that the matters therein contained should be published, because, he says, that great excitement prevailed and numerous public discussions had been held in divers places in England on divers matters of controversy between the churches of England and Rome, with respect to which it was important the truth should be known ; and inasmuch as the said G. G. Achilli took a prominent part in such discussions, and his opinion and testimony were by many persons appealed to and relied on as of a person of character and respectability, with reference to the matters in controversy, it was necessary for the purpose of more effectually examining and ascertaining the truth, that the matters in the said alleged libel should be publicly known, in order that it might more fully appear that the opinion and testimony of the said G. G. Achilli were not deserving of credit or consideration by reason of his previous misconduct : [*Here follow other facts showing that it was for the public benefit that the said*

* The pleas originally filed were demurred to, and amended ; the amended pleas were again demurred to, as being too general in their statements, and were then altered to the above form.

matters charged should be published ———.] And so the said John Henry Newman says he published the said alleged libel as he lawfully might for the causes aforesaid, and this the said John Henry Newman is ready to verify. Wherefore he prays judgment, &c."

See Crown Office Rules, 1886, Form, No. 81.

No. 95.

REPLICATION.

"Hilary Term, 16 Vict., 1852.

"The said C. F. Robinson, Esq., coroner and attorney of our said Lady the Queen, in the Court of Queen's Bench, who prosecutes for our Lady the Queen as to the plea first pleaded, puts himself upon the country, and as to the plea secondly pleaded, saith that the said J. H. Newman of his own wrong and without the cause in his said plea alleged, composed, and published the said libel as in the said information alleged, &c."

Issue joined, Hilary Term, 16 Vict., 1852.

See Crown Office Rules, 1886, Form, No. 83.

[*676] No. 96.

Information ex officio *for a Seditious Libel.*

R. v. *John Horne*, clerk (afterwards *John Horne Tooke*), Cowp. 672; 11 St. Tr. 264; 20 How. St. Tr. 651).

Michaelmas Term, 17 Geo. III. A.D. 1775.

"London to wit.

"Be it remembered that Edward Thurlow, Esq., attorney-general of our present sovereign Lord the King, who for our said present sovereign Lord the King prosecutes in this behalf, in his proper person comes into the Court of our said present sovereign Lord the King before the King himself, at Westminster in the county of Middlesex, on Thursday next after fifteen days from the day of St. Martin in this same term, and for our said Lord the King giveth the Court here to understand and be informed, that John Horne, late of London, clerk, being a wicked, malicious, seditious, and ill-disposed person, and being greatly disaffected to our said present sovereign Lord the King, and to his administration of the government of this kingdom, and the dominions thereunto belonging, and wickedly, maliciously, and seditiously intending, devising, and contriving to stir up and excite discontents and seditions among His Majesty's subjects, and to alienate and withdraw the affection, fidelity, and allegiance of His said Majesty's subjects from His said Majesty, and to insinuate and cause it to be believed that divers of His Majesty's

innocent and deserving subjects had been inhumanly murdered by His said Majesty's troops in the province, colony, or plantation of the Massachusetts-Bay, in New England, in America, belonging to the crown of Great Britain, and unlawfully and wickedly to seduce and encourage His said Majesty's subjects in the said province, colony, or plantation, to resist and oppose His Majesty's government, on the 8th day of June, in the 15th year of the reign of our present sovereign Lord George the Third, &c., with force and arms at London aforesaid, in the parish of St. Mary-le-Bow, in the ward of Cheap, wickedly, maliciously, and seditiously, did write and publish, and cause and procure to be written and published, a certain false, wicked, malicious, scandalous and seditious libel, of and concerning His said Majesty's government, and the employment of His troops, according to the tenor and effect following: '*King's Arms Tavern Cornhill, June 7th*, 1775. At a special meeting this day of several members of the Constitutional Society, during an adjournment, a gentleman proposed, that a subscription should be immediately entered into (by such [* 677] of the members present who might approve the purpose), for raising the sum of £100—to be applied to the relief of the widows, orphans, and aged parents of our beloved American fellow subjects, who, faithful to the character of Englishmen, preferring death to slavery, were, for that reason only, inhumanly murdered by the King's (meaning His said Majesty's) troops, at or near Lexington and Concord, in the province of Massachusetts (meaning the said province, colony, or plantation of the Massachusetts-Bay, in New England, in America) on the 19th of last April; which sum being immediately collected, it was thereupon resolved, that Mr. Horne (meaning himself the said John Horne) do pay to-morrow into the hands of Messieurs Brownes and Collison, on the account of Dr. Franklin, the said sum of £100, and that Dr. Franklin be requested to apply the same to the above-mentioned purpose.—John Horne, (meaning himself the said John Horne), in contempt of our said Lord the King, in open violation of the laws of this kingdom, to the evil and pernicious example of all others in the like case offending, and also against the peace of our said present sovereign Lord the King, his crown and dignity. [*Then follow several counts for the several publications of the same libel in the various newspapers.*]

"And the said attorney-general of our said Lord the King for our said Lord the King further gives the Court here to understand and be informed that the said John Horne, being such person as aforesaid, and again unlawfully, wickedly, maliciously, and seditiously intending, devising and contriving as aforesaid, afterwards, to wit, on the 14th day of July, in the 15th year aforesaid, with force and arms at London aforesaid, in the parish and ward aforesaid, wickedly, maliciously, and seditiously did write and publish, and cause and procure to be written and published, a certain false, wicked, malicious, scandalous, and seditious libel, of and concerning His said Majesty's government, and the employment of His troops, according to the tenor and effect following:—'I (meaning himself the said John Horne) think it proper to give the unknown contributor this notice, that I (again meaning himself the said John Horne)

did yesterday pay to Messrs. Brownes and Collison, on account of Dr. Franklin, the sum of £50 and that I (again meaning himself the said John Horne) will write to Dr. Franklin, requesting him to apply the same to the relief of the widows, orphans, and aged parents of our beloved American fellow subjects, who, faithful to the character of Englishmen, preferring death to slavery, were (for that reason only) inhumanly murdered by the King's (meaning His said Majesty's) troops, at or near Lexington and Concord, in the province of Massachusetts [* 678] (meaning the said province, colony, or plantation of the Massachusetts-Bay in New England in America) on the 19th of April last,—John Horne (again meaning himself the said John Horne) in contempt of our said Lord the King, in open violation of the laws of this kingdom, to the evil and pernicious example of all others in the like case offending, and also against the peace of our said present sovereign Lord the King, his crown, and dignity. [*Then follow other counts for other publications of the same libel.*] Whereupon the said attorney-general of our said Lord the King, who for our said present sovereign Lord the King prosecutes in this behalf, prays the consideration of the court here in the premises, and that due process of law may be awarded against him, the said John Horne, in this behalf, to make him answer to our said present sovereign Lord the King touching and concerning the said premises aforesaid, &c.

E. Thurlow."

See Crown Office Rules, Form, No 31.

No. 97.

Indictment for a Blasphemous Libel.

———, to wit.

The jurors for our Lady the Queen upon their oath present that A. B., being a wicked and evil-disposed person, and disregarding the laws and religion of the realm, and wickedly and profanely devising and intending to bring the Holy Scriptures and the Christian religion into disbelief and contempt among the people of this kingdom, on the ——— day of ———, A. D. ———, unlawfully and wickedly did compromise, print and publish, and cause and procure to be composed, printed, and published, a certain scandalous, impious, blasphemous, and profane libel, of and concerning the Holy Scriptures and the Christian religion, in one part of which said libel there were and are contained, amongst other things, certain scandalous, impious, blasphemous, and profane matters and things, of and concerning the Holy Scriptures and the Christian religion, according to the tenor and effect following, that is to say: [*Here set out the first blasphemous passage*], and in another part thereof there were and are contained, amongst other things, certain other scandalous, impious, blasphemous, and profane matters and things, of and concerning the said Holy Scriptures and the Christian

religion, according to the tenor and effect following, that is to say: [*Here set out other blasphemous passages*]: to the high displeasure of Almighty God, to the great scandal and [* 679] reproach of the Christian religion, to the evil example of all others in the like case offending, and against the peace of our said Lady the Queen, her crown and dignity.

See another precedent in *R.* v. *Ramsey and Foote*, 1 C. & E. pp. 126—131.

No. 98.

Indictment for publishing and selling an Obscene Picture.

———, to wit.

The jurors for our Lady the Queen upon their oath present that A. B., being a wicked and evil-disposed person, and unlawfully devising, contriving and intending to debauch and corrupt the morals of the young and of divers other liege subjects of our said Lady the Queen, on the ——— day of ——— A.D. ———, in a certain open and public shop of him, the said A. B., situate and being at number ——— High Street, in the parish of ———, in the town of ———, in the county aforesaid, unlawfully, wickedly, designedly, and maliciously did publish and sell, and cause and procure to be published and sold, to one C. D., a certain lewd, scandalous and obscene picture [print, photograph, *or* engraving], intituled ———, and representing ——— [*Here give such a detailed description of the picture as will manifestly show its indecency*], to the manifest corruption of the morals of the young, and of other liege subjects of our said Lady the Queen, in contempt of our said Lady the Queen and her laws, to the evil example of all others in the like case offending, and against the peace of our said Lady the Queen, her crown and dignity.

No. 99.

Indictment for Seditious Words.

———, to wit.

The jurors for our Lady the Queen upon their oath present that A. B., being a wicked, malicious, seditious, and evil-disposed person, and wickedly, maliciously, and seditiously contriving and intending the peace of our Lady the Queen and of this realm to disquiet and disturb, and the liege subjects of our said Lady the Queen to incite [* 680] and move to hatred and dislike of the person of our said Lady the Queen and of the goverment established by law within this realm, and to incite, move, and persuade great numbers of the liege subjects of our said Lady the Queen, to insurrection, riots, tumults, and breaches of the peace, and to prevent by force and arms the execution of the laws of this realm and the preservation of the public peace, on the ——— day of ———, A. D.

———, in the presence and hearing of divers, to wit, ——— of the liege subjects of our said Lady the Queen then assembled together, in a certain speech and discourse by him the said A. B. then addressed to the said liege subjects so then assembled together, as aforesaid, unlawfully, wickedly, maliciously, and seditiously did publish, utter, pronounce, and declare with a loud voice of and concerning the government established by law within this realm, and concerning our said Lady the Queen, and the crown of this realm, and of and concerning the liege subjects of our said Lady the Queen, committing and being engaged in divers insurrections, riots, and breaches of the public peace, amongst other words and matter, the false, wicked, seditious and inflammatory words and matter following, that is to say :—[*Here set out the seditious words verbatim*] ; in contempt of our said Lady the Queen, in open violation of the laws of this realm, to the evil and pernicious example of all others in the like case offending, and against the peace of our said Lady the Queen, her crown and dignity.

No. 100.

Indictment for Defamatory Words spoken to a Magistrate in the Execution of his Duty.

Middlesex, to wit.

The jurors for our Lady the Queen upon their oath present, that heretofore, to wit, on the ——— day of ——— in the year of our Lord, ——— one A. B. was brought before C. D., Esquire, then and yet being one of the justices of our said Lady the Queen, assigned to keep the peace of our said Lady the Queen in and for the county of Middlesex, and also to hear and determine divers felonies, trespasses, and other misdeeds committed in the said county ; and the said A. B. was then charged before the said C. D., upon the oath of one E. F., that he, the said A. B., had then lately before feloniously taken, stolen, and taken away divers goods and chattels of the said E. F. And the [* 681] jurors aforesaid, upon their oath aforesaid, do further present, that the said A. B., being a scandalous and ill-disposed person, and wickedly and maliciously intending and contriving to scandalize and vilify the said C. D. as such justice as aforesaid, and to bring the administration of justice in this kingdom into contempt, afterwards, and whilst the said C. D,, as such justice as aforesaid, was examining and taking the dispositions of divers witnesses against him the said A. B., in that behalf, to wit, on the day and year aforesaid, wickedly and maliciously, in the presence and hearing of divers good and liege subjects of our said Lady the Queen, did publish, utter, pronounce, declare, and say with a loud voice to the said C. D., and whilst he the said C. D. was so acting as such justice as aforesaid, the false, wicked, malicious, and seditious words and matter following, that is to say :— [*Here set out the seditious words verbatim*] ; to the great scandal and reproach of the administration of justice in this kingdom, to the great scandal and

damage of the said C. D., in contempt of our said Lady the Queen and her laws, to the evil example of all others in the like case offending, and against the peace of our said Lady the Queen, her crown and dignity.

No. 101.

Indictment for a Libel on a Private Individual at Common Law.

——— , to wit.

The jurors for our Lady the Queen, upon their oath, present that [before and at the time of the committing of the offence hereinafter mentioned, one C. D. was, and still is, a solicitor of the Supreme Court, and exercised and carried on the profession or business of such solicitor at ———, in the county of——— ; and that] A. B. being a person of an evil and wicked mind, and wickedly, maliciously, and unlawfully contriving and intending to injure, vilify, and prejudice the said C. D., and to bring him into public contempt, scandal, infamy, and disgrace, and to deprive him of his good name, fame, credit, and reputation [in his said profession and business, and otherwise to injure and aggrieve him therein], on the ——— day of———, in the year of our Lord ———, wickedly, maliciously, and unlawfully did write and publish, and cause and procure to be written and published, [in the form of a letter directed to one E. F.,] of and concerning the said C. D. [and of and concerning him in his said profession [* 682] and business, and of and concerning his conduct and behaviour therein], the false, scandalous, malicious, and defamatory words following, that is to say :—[*Here set out the libel verbatim, with all necessary innuendoes*], to the great damage, scandal, and disgrace of the said C. D. [in his said profession and business], to the evil example of all others in the like case offending, and against the peace of our said Lady the Queen, her crown and dignity.

No. 102.

Indictment for a Libel on a Dead Man.

The jurors for our Lady the Queen, upon their oath, present that before the committing of the offence hereinafter mentioned, to wit, on the 29th day of May 1883, John Batchelor, of Penarth, in the county of Glamorgan, died, and that Thomas Henry Ensor, being a person of an evil and wicked mind, wickedly, maliciously and unlawfully designing and intending to injure and defame the character, reputation and memory of the said John Batchelor, and to vilify and to throw scandal upon his family and posterity, and to bring them into public contempt and infamy, and to stir up the hatred and ill-will of the subjects of our Lady the Queen against them, and to deprive them of their good name, fame and reputation, and to provoke them to a breach of the peace, on the 23rd day of July

1886, wilfully, maliciously and unlawfully did write and publish, and cause and procure to be printed and published * of and concerning the said John Batchelor, his family and posterity, the false, scandalous, malicious and defamatory words following, that is to say:—"Suggested [* 683] epitaph for the Batchelor statue" [*Here copy the libel verbatim*], to the scandal and reproach of the name and memory of the said John Batchelor, to the great damage and disgrace of his family and posterity, to the evil example of all others in the like case offending and against the peace of our said Lady the Queen, her crown and dignity.

* In the case of *R.* v. *Ensor*, 3 Times L. R. 366, four of the counts ran thus:—"A false, scandalous, and defamatory libel, having a tendency to cause a breach of the peace, and which on the 27th day of July 1886, did cause a certain breach of the peace, to wit, an assault by one Cyril Batchelor and one Llewellyn Batchelor upon one Henry Lascelles Carr at Cardiff, in the county of Glamorgan, in the form of a letter or newspaper paragraph delivered and read by the said T. H. Ensor to John Henry Taylor, James Harris, Henry Lascelles Carr, and divers other persons at Cardiff aforesaid, according to the tenor and effect following, that is to say." These words were inserted because in that case an assault had actually followed the libel; but they are not essential to an indictment for such an offence. Where there has been no assault the defendant is still criminally liable if there be other evidence of a criminal intent.

No. 103.

Indictment under Sect. 4 *of Lord Campbell's Act.*

[*Commence as in precedent No.* 101*; then set out the libel with all necessary innuendoes, and conclude as follows*]:—he, the said A. B., then well knowing the said defamatory libel to be false; to the great damage, scandal, and disgrace of the said C. D., to the evil example of all others in the like case offending, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

No. 104.

Indictment under Sect. 5 *of Lord Campbell's Act.*

[*This will precisely follow the preceding form, merely omitting the words:*—"he, the said A. B., then well knowing the said defamatory libel to be false."]

No. 105.

Demurrer to an Indictment or Information.

And the said A. B., in his own proper person, cometh into court here, and, having heard the said indictment [*or* information] read,

saith, that the said indictment [*or* information] and the matters therein contained, in manner and form as the same above are stated and set forth, are not sufficient in law, and that he the said A. B. is not bound by the law of the land to answer the same; and this he is ready to verify; wherefore, for want of a sufficient indictment [*or* [*684] information] in this belief, the said A. B. prays judgment, and that by the court he may be dismissed and discharged from the said premises in the said indictment [*or* information] specified.

See Crown Office Rules, 1886, Form, No. 80.

No. 106.

Joinder in Demurrer.

And J. N., who prosecutes for our said Lady the Queen in this behalf, saith, that the said indictment [*or* information] and the matters therein contained, in manner and form as the same are above stated and set forth, are sufficient in law to compel the said A. B. to answer the same; and the said J. N., who prosecutes as aforesaid, is ready to verify and prove the same, as the court here shall direct and award: wherefore, inasmuch as the said A. B. hath not answered to the said indictment [*or* information], nor hitherto in any manner denied the same, the said J. N., for our said Lady the Queen, prays judgment, and that the said A. B. may be convicted of the premises in the said indictment [*or* information] specified.

No. 107.

Pleas to an Indictment.

R. v. Niblett.

"At the assizes and general delivery of the Queen's gaol for the county of Berkshire, holden in and for the said county on the fourth day of May in the year of our Lord 1886, cometh into court the said E. N., in her own proper person, and having heard the said indictment read, saith she is not guilty of the said premises in the said indictment above specified and charged upon her, and of this she the said E. N. puts herself upon the country, &c.

"And for a further plea in this behalf the said E. N. says that our Lady the Queen ought not further to prosecute the said indictment against her, because she says it is true that the Reverend A. B. is the man who slept at her house on the fourth day of June last with the said X. Y. [*and so on, stating facts showing the truth of every matter charged in the alleged libel*]; and so the said E. N. says that the said alleged

libel is true in substance and in fact. And the said E. N. further [*685] saith that before and at the time of publishing the said alleged libel, it was for the public benefit that the matters contained therein should be published to the extent that they were published by her, because the said Reverend A. B. then was and still is a clergyman of the Church of England, in charge of the parish of ———, in the said county, and the said X. Y. had been a servant of the said Reverend A. B. in the said parish, and because it was notorious in the said parish that the said X. Y. was a woman of immoral character, and because scandal and evil report existed in the said parish to the effect that she had had improper connection with the said Reverend A. B. whilst she was in his service, and also that he had since cohabited with her at ——— in the county of Middlesex, where she passed under the name of Mrs. B., and other places and under other names to such parishioners unknown, and because these reports created great scandal to the church, and greatly disquieted the parishioners of the said parish, and because it was of the greatest consequence to such parishioners to know whether these reports were true or false, and to obtain evidence which might be laid before the bishop of the diocese in which such parish was situated, in order that proceedings might be taken to inquire into the truth or falsity of such reports: wherefore the said E. N., being aware of the premises and being herself a member of the said Church of England, and believing it to be her duty to acquaint the said parishioners with the facts above mentioned as to the conduct of the said Reverend A. B., such facts being within her own knowledge, published the said alleged libel to the churchwarden of the said parish, and to the parish clerk, and to six of the parishioners of the said parish, all of whom were churchmen and interested therein, in order that the said alleged libel, or a copy thereof should be forwarded to the said bishop, and a copy thereof was forwarded to the said bishop, who thereupon at once began to inquire into the truth or falsity of the said reports; and the said E. N. in no way published the said alleged libel save to the said bishop, churchwarden, parish clerk, and parishioners aforesaid. Wherefore the said E. N. says it was for the public benefit that the matters charged in the said alleged libel, and all and every of them, should be so published by her as aforesaid. And this she is ready to verify, wherefore she prays judgment, and that by the court here she may be dismissed and discharged from the said premises in the said indictment above specified."

See another Precedent, 2 Cox, C. C., App. xxix; and Crown Office Rules, 1886, Form, No. 81.

[*686] For a plea in abatement to an indictment for libel, see *R.* v. *Gavan Duffy*, 1 Cox, C. C. 282, and *R.* v. *J. Mitchell*, 11 L. T. (Old S.) 112.

For a plea of abatement on the ground that other proceedings for the same libel were still pending, see *R.* v. *J. Mitchell*, 3 Cox, C. C. 94, 106; with demurrer thereto and joinder in demurrer (*ib.* 96), and replication (*ib.* 107).

For a plea to the jurisdiction of the court in a criminal case of

libel, and a demurrer thereto, see *R.* v. *Hon. Robert Johnson*, 6 East, 583 ; 2 Smith, 591 ; 29 How. St. Tr. 103.

No. 108.

Replication to the above Pleas.

And thereupon J. N. [*the clerk of arraigns, &c.*] who prosecutes for our said Lady the Queen in this behalf, as to the plea of the said A. B. by him firstly above pleaded, and whereof the said A. B. hath put himself upon the country, doth the like, &c. And as to the plea of the said A. B. by him secondly above pleaded, the said J. N., who prosecutes as aforesaid, says that our said Lady the Queen ought not by reason of anything in the said second plea alleged to be barred or precluded from prosecuting the said indictment against the said A. B., because he says that he denies the said several matters in the said second plea alleged, and saith that the same are not, nor are nor is any or either of them, true ; but that the said A. B. of his own wrong, and without the cause and matter of defence in his said second plea alleged and set forth, committed the offence and published the said libel in manner and form as in the said indictment is mentioned. And this he, the said J. N., prays may be inquired of by the country, &c. And the said A. B. doth the like.

See Crown Office Rules, 1886, Form, No. 83.

No. 109.

Demurrer to a Plea.

And J. N., who prosecutes for our said Lady the Queen in this behalf, as to the said plea of the said A. B. by him above pleaded, saith that the same, and the matters therein contained, in manner and [*687] form as the same are above pleaded and set forth, are not sufficient in law to bar or preclude our said Lady the Queen from prosecuting the said indictment against him the said A. B., and that our said Lady the Queen is not bound by the law of the land to answer the same ; and this he, the said J. N., who prosecutes as aforesaid, is ready to verify : wherefore, for want of a sufficient plea in this behalf, he the said J. N. for our said Lady the Queen, prays judgment, and that the said A. B. may be convicted of the premises in the said indictment specified.

See Crown Office Rules, 1886, Form, No. 84.

No. 110.

Joinder in Demurrer.

And the said A. B. saith, that his said plea, by him above pleaded, and the matters therein contained, in manner and form as the same are above pleaded and set forth, are sufficient in law to bar and preclude our said Lady the Queen from prosecuting the said indictment against him the said A. B., and the said A. B. is ready to verify and prove the same, as the said court here shall direct and award: wherefore, inasmuch as the said J. N., for our said Lady the Queen, hath not answered the said plea, nor hitherto in any manner denied the same, the said A. B. prays judgment, and that by the court here he may be dismissed and discharged from the said premises in the said indictment specified.

See Crown Office Rules, 1886, Form, No. 85.

[*688]

APPENDIX B.

LORD COLERIDGE'S SUMMING UP TO THE JURY

IN THE CASE OF

REG. v. RAMSEY AND FOOTE,

48 L. T. 733 ; 15 Cox, C. C. 231 ; 1 C. & E. 126.

(*As revised by the Lord Chief Justice.*)

GENTLEMEN OF THE JURY.

The two defendants are indicted for the publication of blasphemous libels ; and the two questions which arise for your consideration, are :—First, Are these publications in themselves blasphemous libels? Secondly, If they are so, is the publication of them traced home to the defendants so that you can find them guilty?

I will begin with the last question, though it is reversing the logical order, because it is the shorter and more simple of the two. Both questions are entirely for you. When you have heard what I have to say to you as to the state of the law as I understand it, it will then be for you to pronounce a general verdict of Guilty or Not guilty.

Now for the purpose of this second question, which I deal with first, I will assume for the moment that these are blasphemous libels, but though I assume it now, I will discuss it with you afterwards. Assuming them then to be blasphemous libels, is the publication of them traced home to the defendants? As you are not the same jury who tried Mr. Bradlaugh, it is necessary for me to repeat to you the direction on this subject which I gave a few days ago to the jury which tried him. As to the matter of publication, the law has been altered in most important respects by a statute passed early in the [*689] reign of the present Queen—6 & 7 Vict. c. 96. It used to be the law that the proprietor of a newspaper was criminally, not merely civilly, but criminally responsible for a libel inserted in his paper, and that a bookseller or publisher was criminally responsible for a libel in any book which was sold or published under his authority, even though the newspaper proprietor, or the bookseller or publisher did not know of or authorise the insertion of any libel, and did not even know of its existence. But this in the *criminal*

law was an anomaly and a grievance which the statute I have referred to was, in its seventh section, intended to remedy. That section came to be considered in the case of *Reg.* v. *Holbrook*, in which a gross libel on the Town Clerk of Portsmouth had been published in a Portsmouth newspaper. The case was twice tried at Winchester, first before Lord Justice Lindley, and secondly before Mr. Justice Grove. On each occasion the ruling of the judge who tried the case was questioned in the Queen's Bench in the time of my predecessor in this seat; on each occasion by the same three judges, Lord Chief Justice Cockburn, and Mellor, and Lush, JJ.; on each occasion there was the same difference of opinion, the Lord Chief Justice, and Lush, J., holding one way and Mellor, J., the other. But, notwithstanding this difference of opinion, the case is a binding authority upon me, and I lay down the law to you in the terse and clear language of Mr. Justice Lush. "The effect of the statute," says he (L. R. 4 Q. B. 50), "read by the light of previous decisions, and read so as to make it remedial, must be, that an authority from the proprietor of a newspaper to the editor or publisher to publish what is libellous, is no longer to be, as it formerly was, a presumption of law, but a question of fact. Before the act the only question of fact was, whether the defendant authorized the publication of the paper, now it is whether he authorized the publication of the libel. Criminal intention is not to be presumed, but it is to be proved, and in the absence of evidence to the contrary, a person who employs another to do a lawful act, *i. e.*, to publish, is to be taken to authorize him to do it in a lawful and not in an unlawful manner." Such is now the law laid down in admirable language by great authority; and it is for you to say whether according to the law as so laid down these defendants (either or both of them) did or did not authorize the publication of these libels.

On the trial of Mr. Bradlaugh this question of fact was the question in the case; he grounded his defence upon the contention, that whatever was the character of the published matter, the publication was not by his authority. That was his defence; and upon that [*690] defence, so far as I may presume to assign reasons for the general verdict of a jury, he was acquitted. In the trial before us the process has been reversed. The fact of publication by the defendants has hardly been contested. The evidence is all one way; it is all uncontradicted, and it is overwhelming. It is proved that the defendant Ramsey sold the papers which contained the libels. It is proved that the articles charged as libellous were inserted by the express direction of the defendant Foote. There is nothing to qualify this proof; the defendants in fact do not deny their liability; and though the case is for you, I do not know that I need refrain from saying that, if upon the evidence you have heard, you think both the defendants liable for the publication of these alleged libels, I shall entirely agree with you.

That, however, is, comparatively speaking, the least matter you have to decide; for the proof is clear, and it is not disputed. The great point still remains, Are these articles within the meaning of the law blasphemous libels? Now that, as you have been truly

told, is a matter absolutely for you. On you is the responsibility, after looking at them and reading them, of saying whether they are or are not blasphemous libels. My duty is to explain to you as clearly as I can what is the law upon the subject. My duty, further, is not to answer the speeches of the defendants (that is no part of the duty of a judge), but to point out to you what in their arguments is in my judgment well-founded, and what is not; and then, when you have listened to me, the question is entirely for you. I am sure from my experience of juries that, in a criminal case especially, they will obey the law as declared by the judge; they will take the law from the judge, whether they like it or do not like it, and apply it honestly to the facts before them.

Gentlemen, I have said before, and I take the freedom to repeat, that it is far more important the law should be administered with absolute integrity, than that in this case or in that the law should be a good law or a bad one. The moment juries or judges go beyond their functions, and take upon themselves to lay down the law or find the facts, not according to the law as it is, but according to the law as they think it ought to be, then the certainty of the law is at an end; there is nothing to rely upon; we are left to the infinite variety and uncertainty of human opinion; to caprice which may at any moment influence the best of us; to feelings and prejudices, perhaps excellent in themselves, but which may distort or disturb our judgment, and distract our minds from the single simple operation of ascertaining whether the facts proved bring the case within the law as we are bound to take it. Forgive me if I seem to press too earnestly upon a [*691] special jury of Middlesex these obvious commonplaces. If at my age, with so much to bring about a temper of indifference, with the training which a whole life spent in judicial pursuits ought to have brought with it; if I feel, as I confess I do, that it is hard in a case like this to be perfectly just and absolutely impartial, it may perhaps be that to some of you at least my earnest warning may not be absolutely useless; at any rate I am sure you will pardon me for having presumed to utter it.

Gentlemen, you have heard with truth that these things are, according to the old law, if the dicta of old judges, dicta often not necessary for the decisions, are to be taken as of absolute and unqualified authority,—that these things, I say, are undoubtedly blasphemous libels, simply and without more, because they question the truth of Christianity. But I repeat what I said on the former trial, that, for reasons which I will presently explain, these dicta cannot be taken to be a true statement of the law, as the law is now. It is no longer true, in the sense in which it was true when these dicta were uttered, that Christianity is part of the law of the land. In the times when these dicta were uttered, Jews, Roman Catholics, Nonconformists of all sorts were under heavy disabilities for religion, were regarded as hardly having civil rights. Everything almost, short of the punishment of death, was enacted against them. The epithet "ferocious," which has been applied to the statute of William III., to which so much reference has been made, is hardly stronger than that statute deserves. Jews, it is true, were excluded

from Parliament in a sense by accident, for the oath which excluded them was not pointed at them ; but no one can doubt that at that time if it had occurred to anyone that they were not excluded, a law would have been forthwith passed to exclude them. Historically and as a matter of fact, such was the state of things when these dicta were pronounced. But now, so far as I know the law, a Jew might be Lord Chancellor ; most certainly he might be Master of the Rolls. The great and illustrious lawyer whose loss the whole profession is deploring, and in whom his friends knew that they lost a warm friend and a loyal colleague ; he, but for the accident of taking his office before the Judicature Act came into operation, might have had to go circuit, might have sat in a criminal court to try such a case as this, might have been called upon, if the law really be that " Christianity is part of the law of the land " in the sense contended for, to lay it down as law to a jury, amongst whom might have been Jews,—that it was an offence against the law, as blasphemy, to deny that Jesus Christ was the Messiah, a thing which he himself did deny, which Parlia [*692] ment had allowed him to deny, and which it is just as much part of the law that any one may deny, as it is your right and mine, if we believe it, to assert. Therefore, to base the prosecution of a bare denial of the truth of Christianity, *simpliciter* and *per se* on the ground that Christianity is part of the law of the land, in the sense in which it was said to be so by Lord Hale, and Lord Raymond, and Lord Tenterden, is in my judgment a mistake. It is to forget that law grows ; and that though the principles of law remain unchanged, yet (and it is one of the advantages of the common law) their application is to be changed with the changing circumstances of the times. Some persons may call this retrogression, I call it progression, of human opinion. Therefore, to take up a book or a paper, to discover merely that in it the truth of Christianity is denied without more, and thereupon to say that now a man may be indicted upon such denial as for a blasphemous libel is, as I venture to think, absolutely untrue. I, for one, positively refuse to lay that down as law, unless it is authoritatively so declared by some tribunal I am bound by. Historically, I cannot think I should be justified in so doing, for Parliament, which is supreme and binds us all, has enacted statutes which make that old view of the law no longer applicable. Nor is it any disrespect whatever to the great men of elder days to hold that what they said in one state of things is not applicable under another.

Gentlemen, when I last addressed a jury on this subject, I put a case to them which I thought was a *reductio ad absurdum* of the argument. I said that if the law was as contended for, it would be enough to say that anything was part of the law of the land, and that thereupon there could be no discussion and no reform ; for that to attack any part of the law, however gravely and respectfully, would be, if not blasphemous yet seditious. Monarchy is part of the law of the land ; primogeniture is part of the law of the land ; the laws of marriage are part of the law of the land, and so forth. But if the doctrine contended for be true, to republish Algernon

Sydney, or Harrington, or Locke, or Milton, would expose a man to a prosecution for a breach of the law of libel. But it shows how dangerous it is for some men at least to presume upon their knowledge. What I put as a *reductio ad absurdum* I have since discovered actually occurred, and was decided to be law by a judge early in the last century. There is a case reported by Lord Chief Baron Gilbert (*R.* v. *Bedford*), from which it appears that a man was actually convicted of a seditious libel for discussing gravely and civilly, and as the report of the case in Bacon's Abridgment, tit. *Libel*, says "without any reflection whatever upon any part of the then existing Govern[*693]ment," the respective advantages of an hereditary or elective monarchy. I need hardly say that if such a case arose now no judge would follow that authority, no jury would convict, the whole proceeding would be denounced, and rightly denounced, as altogether monstrous.

It is clear, therefore, to my mind that the mere denial of the truth of the Christian religion is not enough alone to constitute the offence of blasphemy. What then is enough? No doubt we must not be guilty of taking the law into our own hands, and converting it from what it really is to what we think it ought to be. I must lay down the law to you as I understand it, and as I read it in books of authority. Now, Mr Foote, in his very able address to you, spoke with something like contempt of the person he called "the late Mr. Starkie." He did not know Mr. Starkie; he did not know how able and how good a man he was. Mr. Starkie died when I was young; but I knew him, and everyone who knew him knew that he was a man not only of remarkable power of mind, but of opinions liberal in the best sense; and if ever the task of law-making could be safely left in the hands of any man perhaps it might have been in his. But, what is more material to the present purpose, the statement of the law by Mr. Starkie has again and again been assented to by judges as a correct statement of the existing law. I will read it to you, therefore, as expressing what I lay down to you as law in words far better than any at my command.

"There are no questions of more intense and awful interest than those which concern the relations between the Creator and the beings of his creation; and though, as a matter of discretion and prudence, it might be better to leave the discussion of such matters to those who, from their education and habits, are most likely to form correct conclusions, yet it cannot be doubted that any man has a right, not merely to judge for himself on such subjects, but also, legally speaking, to publish his opinions for the benefit of others. When learned and acute men enter upon these discussions with such laudable motives, their very controversies, even where one of the antagonists must necessarily be mistaken, so far from producing mischief, must in general tend to the advancement of truth, and the establishment of religion on the firmest and most stable foundations. The very absurdity and folly of an ignorant man, who professes to teach and enlighten the rest of mankind, are usually so gross as to render his errors harmless; but be this as it may, the law interferes not with his blunders so long as they are honest ones, justly considering

that society is more than compensated for the partial and limited [*694] mischief which may arise from the mistaken endeavours of honest ignorance, by the splendid advantages which result to religion and to truth from the exertion of free and unfettered minds. It is the mischievous abuse of this state of intellectual liberty which calls for penal censure. The law visits not the honest errors, but the malice of mankind. A wilful intention to pervert, insult, and mislead others, by means of licentious and contumelious abuse, applied to sacred subjects, or by wilful misrepresentations or artful sophistry, calculated to mislead the ignorant and unwary, is the criterion and test of guilt.

"A malicious and mischievous intention, or what is equivalent to such an intention, in law as well as in morals, a state of apathy and indifference to the interests of society, is the broad boundary between right and wrong."

Now that I believe to be a correct statement of the law. Whether it ought to be or not is not for me to say. I tell you the law as I understand it, leaving you to apply it to the facts of the particular case before you. There was much force, no doubt, in the way in which Mr. Foote dealt with the passage in his address to you. The vagueness, the uncertainty which he insisted upon are possibly, however, inherent in the subject, and there is perhaps more to be said in favour of Mr. Starkie's view than may appear without reflection. There is a passage in his book taken, I believe, from Michaelis, in which it is pointed out with great truth that in one view the law against blasphemous libel may be for the benefit of the libeller himself, who, if there were no law, might find its absence ill exchanged for the presence of popular vengeance and indignation.

"Now to the man who from his heart believes his religion, and regards it as the way to eternal bliss, and as the comfort both of life and death, and who of course wishes to educate his family in the knowledge and belief of it, nothing can be more offensive than to hear another speaking against it, and employing, not arguments (although even these he might let alone, because every man has a right even to err, without our forcibly interfering to rid him of his errors), but insolent and contemptuous language, and blaspheming its gods, its prophets, saints, and sacred things. Were the religion in question only *tolerated*, still the State is bound to protect every person who believes it from such outrages, or it cannot blame him if he has not the patience to bear them. But if it be the established national religion, and of course the person not believing it be only tolerated by the State, and though he enjoys its protection just as if he were in a strange house, such an outrage is excessively gross; and unless we [*695] conceive the people so tame as to put up with any affront, and of course likely to play but a very despicable part on the stage of the world, the State has only to choose between the two alternatives, of either punishing the blasphemer himself, or else leaving him to the fury of the people. The former is the milder plan, and therefore to be preferred, because the people are apt to gratify their vengeance without sufficient inquiry, and of course it may light upon the innocent.

"Nor is this by any means the treatment which I only claim for the religion which I hold to be the true one; I am also bound to admit it when I happen to be among a people from whose religion I dissent; were I in a Catholic country, to deride their saints or insult their religion by my behaviour, were it only by rudely and designedly putting on my hat when decency would have suggested the taking it off; or were I in Turkey, to blaspheme Mahomet, or in a heathen city its gods, nothing would be more natural than for the people, instead of suffering it, to avenge the insult in their usual way, that is, tumultuously, passionately, and immoderately; or else the State would, in order to secure me from the effects of their fury, be under the necessity of taking my punishment upon itself, and if it does so, it does a favour both to me and other dissenters from the established religion, because it secures us from still greater evils."

It is not so clear, therefore, that some sort of protection for the constituted religion of the country is not a good thing, even for those who differ from it; for if there were no such protection, the consequences pointed out by Michaelis might too probably ensue. It does not follow that because the objects of popular dislike differ in different ages;—it does not follow (I wish it did) that the populace of our age are much wiser than the populace of earlier times. It is not so very long ago in our history since the populace of Birmingham wrecked the house and burnt the library of Dr. Priestley, a true philosopher, and excellent man. It was not the State which did that, it was the populace. And it is therefore not so clear to my mind that some sort of blasphemy laws reasonably enforced may not be an advantage, even to those who differ from the popular religion of a country, and who desire to oppose and to deny it. Further, therefore, it must not be taken as so absolutely certain that all these laws against blasphemy are in principle tyrannical. Whether, however, they are so or not, if they exist we must administer them, and the principle upon which we are to administer them is to be found in the passage I have read from Starkie.

But I think I ought to go further, and to say that such study as I [* 696] have been able to make of the cases has not satisfied me that the law ever was laid down differently from the law as laid down by Mr. Starkie. I do not pretend to have the time or learning to discuss with you exhaustively all the cases on the subject. I have taken a few of the leading ones, speaking roughly a century apart from each other, and I find the law, as I understand it and have laid it down to you, to be laid down practically in the same way in all these cases. It is perhaps worth observing that this law of blasphemous libel first appears in our books—at least that cases relating to it are first reported—shortly after the curtailment or abolition of the jurisdiction of the Ecclesiastical Courts in matters temporal. Speaking broadly, before the time of Charles II. these things would have been dealt with as heresy; and the libellers, so-called, of more recent days would have suffered as heretics in earlier. But I pass to the cases which are reported. The first of them is a case decided by that great lawyer Lord Hale, of whom Mr. Foote spoke with some respect. He was indeed a man of great intellectual power, of abso-

lute integrity, whose life was that of a Christian saint. If Mr. Foote had read the full report of the trial of the witches before Lord Hale, he would have seen that Lord Hale was there doing what many a judge has had to do, was administering a law he did not like, and so gave to the accused persons every advantage which his great skill in the law fairly allowed him to give; but neither the prisoners nor the jury would take the advantage which he offered them. The case is curious, and he who reads it I think will say that it is a very terse and misleading analysis of it, that Lord Hale hung witches because of the language of the Bible; though no doubt the passages in Exodus and Deuteronomy were referred to. Anyone who takes the pains to read the case through will see that, judging him even by the standard of the present day, there is much more to be said for Lord Hale's conduct on that occasion than the run of mankind believe. But in the case of *Taylor* (which I cite from Ventris, who was himself a judge, and who gives the best report) Lord Hale had the following words before him; and you must always take a case and an opinion with reference to the subject-matter as to which the case was decided or the opinion given. The words, as Ventris says, were "blasphemous expressions horrible to hear," viz., "that Jesus Christ was a bastard and a whoremaster, that religion was a cheat, and that he feared neither God, the devil, or man." Those were the words on which Lord Hale had to decide in that case, and what he says is this: "Such kind of wicked blasphemous words are not only an offence to God and religion, but a crime against the laws, State, and Govern [* 696] ment, and therefore punishable in this court." That is what Lord Hale *held*, in one of the earliest cases on the subject. You may find expressions which seem to go further in the reasons which he gives, but before these cases are so glibly cited, as they sometimes are, you should look and see what is the subject-matter of the decision. Lord Hale held "*such kind* of wicked blasphemous words" to be a blasphemous libel, and if they came before me I too should hold them, without hesitation, to be a blasphemous libel, though I am no more disposed to hang witches than Lord Hale really was.

The next case, on which much stress has been laid, and which is usually cited from Strange, though it is more fully and better reported in Fitzgibbons, is the case of *Woolston*, who was convicted of blasphemous discourses upon the miracles of our Lord, and the court, as reported by Fitzgibbons, lay very great stress on what they call "*general and indecent attacks*," and carefully state that they did not intend to include disputes between men on controverted matters. That is the law as laid down by Lord Raymond, a great lawyer, no doubt, and a man of high character, though of much which Lord Raymond says and of many of the expressions in his judgment I think that time and change have destroyed the authority.

There is then the case which is commonly cited as bringing the law down almost to our own time—the case of *R.* v. *Waddington*, tried before Lord Tenterden, and reported in 1 B. & C. The words of the libel were that "Jesus Christ was an impostor, a murderer, and a fanatic." The Lord Chief Justice laid it down that it was a

libel, and a juryman asked the Lord Chief Justice whether a work which denied the divinity of Our Saviour was a libel. Now mark the answer given by Lord Tenterden, one of the most cautious and justly respected of men: "He answered that a work *speaking of Jesus Christ in the language referred to* was a libel." That ruling was questioned in the King's Bench before Lord Tenterden himself, and Bayley, Holroyd, and Best, JJ. The three judges first named were as great lawyers as ever adorned our bench; and though Best, J., was a much abler judge than it is now-a-days the fashion to call him, still no one but would consider him the inferior of the other three. But when the case was moved in the King's Bench, Lord Tenterden said, "I told the jury that any publication in which Our Saviour was spoken of *in the language used in this publication* was a libel, and I have no doubt whatever that it is so. I have no doubt it is a libel to publish the words that *Our Saviour was an impostor, a murderer, and a fanatic*." Mr. Justice Bayley says, "It appears to me that the direction of the Lord Chief Justice was perfectly right. There cannot be any doubt [*698] that a work *which does not merely deny the Godhead of Jesus Christ, but which states him to have been an impostor, and a murderer*, is at common law a blasphemous libel." Mr. Justice Holroyd says, "I have no doubt whatever that *any publication in which Jesus Christ is spoken of in the language used in this book is a blasphemous libel*, and that therefore the direction was right in point of law." Mr. Justice Best gives a longer judgment, in more rhetorical language, but to the same effect, and he concludes, "It is not necessary for me to say whether it be libellous to argue from the Scriptures against the divinity of Christ. *That is not what the defendant professes to do.* The legislature has never altered the law, nor can it ever do so while the Christian religion is considered to be the basis of that law." Now this is the case which is often cited, I must think by those who have not read it, as an authority that any attack upon Christian doctrine, however respectful and decent in language, is by law a blasphemous libel. It is authority, as I think, for nothing of the kind. It binds me here no doubt, and I shall direct you according to what I conceive is its meaning.

There is another case, the last with which I shall trouble you, not indeed exactly in point, but which is sometimes cited in support of the proposition that to attack Christianity is to expose yourself to an indictment for libel. It is the case of *Cowan* v. *Milbourn*, decided in 1867, and reported in L. R. 2 Exch. 230. It was an action in which the owner of some rooms justified a breach of his contract to let them, on the ground that they were to be used for lectures directed against the character of Christ and his teaching, and the defendant's justification was upheld by the court. The late Lord Chief Baron undoubtedly goes the full length of the doctrine contended for, and from his reasons, on the grounds I have already stated, I respectfully dissent. But Lord Bramwell puts his concurrence in the judgment on a totally different ground. He bases it on the fact that the statute of William III. is still unrepealed; that these lectures were to be in contravention not of the common law—

on that he is silent—but of this statute ; and he is careful moreover to point out the distinction between a thing, such as prostitution for example, being "unlawful in the sense that the law will not aid it, which it may be, and yet that the law will not punish it." So that, if I understand him, his authority cannot be invoked for the proposition that the proposed lectures were necessarily blasphemous libels or the subjects of indictment.

I think therefore that anyone who calmly and carefully considers the cases will very much doubt whether the old law is really open to [*699] the attacks which have been made upon it. I doubt extremely whether if you carefully read through—not merely look at —the cases and master the facts upon which the decisions were pronounced, I doubt if they will be found to be so harsh and illiberal as it has been the fashion in modern times to describe them.

But whether this is so or not, Parliament at least has altered the law on these subjects ; it is no longer the law that none but professors of Christianity can take part or have rights in the State ; others have now just as much right in civil matters as any member of the Church of England has. The condition of things is no longer what it was when these great judges pronounced the judgments which I think have been misunderstood, and strained to a meaning they do not warrant.

It is a comfort to think that things have been altered. I observe that in the case of *The Attorney-General* v. *Fearson*, decided by Lord Eldon in 1817 and reported in Merivale, he expressed a doubt whether the provisions of the 9 & 10 Will. III., as to persons denying the Trinity, were or were not repealed by a later statute of Geo. III. Some old things, and amongst them this statute, are shocking enough, and I do not defend them ; but it must be remembered what was the state of the country when that statute passed—who was the king, what was the succession, what were the factions which divided the country, what were the feelings which naturally agitated Parliament. In these regards the statute is not perhaps defensible, but at least it is explicable. At all events, no man would dream of enacting such a statute now, and I trust that Lord Eldon's doubts will never be solved by a court pronouncing them to be well founded.

Such are the rules, as I tell you, by which you are to judge of these libels. But further, you have heard a great deal, powerfully put by Mr. Foote, about the inexpediency of these laws in any view of them, and as to the way in which they are worked. To observe on this is the least pleasant part of my unpleasant duty, and I wish I could avoid it. It might perhaps be enough to say that these are things with which you and I have nothing to do. We have to administer the law as we find it, and if we don't like it we should try to get it altered. In a free country, after full discussion and agitation, a change is always effected if it approves itself to the general sense of the community. Mr. Foote has told you that this movement against him and his friends is to be regarded as persecution ; and it is true, as he has said, that persecution, unless thoroughgoing, seldom succeeds. Irritation, annoyance, punishment which

stops short of extermination, very seldom alter men's religious convictions. Entirely without one [*700] fragment of historical exaggeration, I may say that the penal laws which fifty or sixty years ago were enforced in Ireland were unparalleled in the history of the world. They existed 150 years; they produced upon the religious convictions of the Irish people absolutely no effect whatever. The Irish people could not be exterminated. Everything possible by law short of actual extermination and personal violence was done, and done without the smallest effect. No doubt therefore persecution, unless it is far more thorough-going than anyone in England and in this age would stand, is, speaking generally, of no avail.

It is also true, that persecution is a very easy form of virtue. A difficult form of virtue is to try in your own life to obey what you believe to be God's will. It is not easy to do, and if you do it, you make but little noise in the world. But it is easy to turn on some one who differs from you in opinion, and in the guise of zeal for God's honour, to attack a man whose life perhaps may be much more pleasing to God than is your own. When it is done by men full of profession and pretension, who choose that particular form of zeal for God which consists in putting the criminal law in force against some one else, many quiet people come to sympathize not with the prosecutor but with the defendant. That will be so as human nature goes, and all the more if the prosecutors should by chance be men who enjoy the wit of Voltaire, who are not repelled by the sneer of Gibbon, and who rather relish the irony of Hume. It is still worse if the prosecutor acts not from the strange but often genuine feeling that God wants his help and that he can give it by a prosecution, but from partizan or political motives. Nothing can be more foreign from one's notions of what is high-minded, noble, or religious; and one must visit a man who would so act, not for God's honour, but using God's honour for his own purposes, with the most disdainful disapprobation that the human mind can form.

However, the question here is not with the motives, of which I know nothing, nor with the characters, of which I know if possible less, of those who instituted these proceedings, but with the proceedings themselves, and whether they are legal. The way in which Mr. Foote defends himself is able, and well worthy of your attention; and you must say, after a few words from me, what you think of it.

Mr. Foote's case, as I understand it, is this (he will excuse me if I do not state it accurately): "I am not going to maintain," says he, "that this is all in the best taste; some of it may be coarse; some of it to men of education may give offence. It *is* intended to be an [*701] attack on Christianity; it is intended distinctly to be an attack on what I have seen attacked in the publications of cultivated agnosticism. It is meant to point out that in the books which your professing Christians call sacred are to be found records of detestable crimes, of horrible cruelties, of the lives of sensual, selfish, cruel men, all of which are said to have been pleasing to Almighty God. I do mean to attack your representation of Almighty God. I say your books are not true; I say your religion is what Tacitus called

it—a detestable superstition. I mean this, and if I have said it in coarse language, that is because I have not sufficient culture or education to cull my words carefully. But I will bring before you a number of books sold on every bookstall of Mr. Smith, written by persons admitted to the very highest society in the land, in which not only are the same things to be found in point of matter, but I will read you passages in which there is very little difference in manner—passages, for example, from John Stuart Mill, from Grote, from Shelley" (I mention the dead that I may not wound the feelings of the living). "No one ever dreamed of attacking Shelley." (He is wrong in fact, for Shelley's publisher was prosecuted, and Shelley himself was deprived by Lord Eldon of the custody of his children.) "I will show you things written by these men quite as strong and quite as coarse as anything to be found in these publications of mine; and it is plain the law cannot be as suggested, because it can never be true that a poor man cannot do what a rich man may; it cannot be true that you may blaspheme if you blaspheme in civil language."

Such I understand, put into my own words, to be Mr. Foote's contention. On that I have two things to say: one in Mr. Foote's favour, and one against him. He wished to have it impressed upon you that he is not, and never has been a licentious writer in the sense in which Mr. Starkie uses the word licentious. He has not, he says, pandered to the sensual passions of mankind. You will have the documents before you, and you will judge for yourselves. For myself I should say that in this matter he is right. It is a thing in his favour, and he is entitled to have it said.

But upon the other point, if the law as I have laid it down to you is correct—and I believe it has always been so—if the decencies of controversy are observed, even the fundamentals of religion may be attacked without a person being guilty of blasphemous libel. There are many great and grave writers who have attacked the foundations of Christianity. Mr. Mill undoubtedly did so: some great writers now alive have done so too; but no one can read their writings [*702] without seeing a difference between them and the incriminated publications, which I am obliged to say is a difference not of degree but of kind. There is a grave, an earnest, reverent, I am almost tempted to say religious, tone in the very attacks on Christianity itself, which shows that what is aimed at is not insult to the opinions of the majority of Christians, but a real, quiet, honest pursuit of truth. If the truth at which these writers have arrived is not the truth we have been taught, and which, if we had not been taught it, we might have discovered, yet because these conclusions differ from ours, they are not to be exposed to a criminal indictment. With regard to many of these persons therefore I should say they are within the protection of the law as I understand it.

With regard to some of the others, passages from whose writings Mr. Foote read—I heard them yesterday for the first time—I do not at all question that Mr. Foote read them correctly. I confess, as I heard them, I had, and have, a difficulty in distinguishing them from the alleged libels. They do appear to me to be open to the

same charge, on the same grounds, as Mr. Foote's writings. He says many of these things are written in expensive books, published by publishers of known eminence ; that they are to be found in the drawing-rooms, studies, libraries, of men of high position. It may be so. If it be, I will make no distinction between Mr. Foote and anyone else ; if there are men, however eminent, who use such language as Mr. Foote, and if ever I have to try them, troublesome and disagreeable as it is, if they come before me, they shall, so far as my powers go, have neither more nor less then the justice I am trying to do to Mr. Foote. If they offend against the blasphemy laws, they shall find that so long as the laws exist, whatever I may think about their wisdom, there is but one rule in this court for all who come to it. This much Mr. Foote may depend upon. So far as I can judge, some of the expressions which he read seemed to be strong, shall I say coarse ?—expressions of contempt and hatred for the generally recognized truths of Christianity and for the Hebrew Scriptures, which are said to have been inspired by God Himself. But Mr. Foote must forgive me for saying that this is no argument whatever in his favour. Let me explain.

It is no argument for a burglar or a murderer (I mean no offence to Mr. Foote ; I should be unworthy of my position if I insulted anyone in his)—it is no argument, I say, in favour of a murderer or a burglar that some other person has also committed a burglary or a murder. Because in the infinite variety of human affairs some persons may have escaped, that is no reason why others should not be brought [* 703] to justice. If he is correct in his citations from these writers, it seems to me that some of them are fairly liable to such a prosecution as his. Suppose they are, that does not show that he is not. What Mr. Foote had to show was, not that other people were bad, but that he was good ; not that other persons were guilty, but that he was innocent. It is no answer to bring forward these other cases. It is not enough to say these other persons have done these things, if they are not brought before us.

Gentlemen, I not only admit, but I urge upon you, and on every one who hears me, that whilst laxity in the administration of the law is bad, the most odious laxity of all is discriminating laxity, which lays hold of particular persons and lets other persons equally guilty go scot free. That may be, that is so, but it has nothing to do with this case. The question here is not whether other persons ought to be standing where Mr. Foote and Mr. Ramsey now stand, but what judgment we ought to pass on Mr. Foote and Mr. Ramsey, who do stand here.

In short and in fine, we have to administer the law whether we like it or no. It is undoubtedly a disagreeable law, or may become so, but I have given you some reasons for thinking it not so bad nor so indefensible as Mr. Foote has argued that it is. I think it, on the contrary, a good law that persons should be obliged to respect the feelings and opinions of those amongst whom they live. I assent to the passage from Michaelis, that in a Catholic country we have no right to insult Catholic opinion, nor in a Mohamedan country have we any right to insult Mohamedan opinion. I differ from

both, but I am bound as a good citizen to treat with respect opinions with which I do not agree.

Take these publications with you ; look at them ; if you think they are permissible attacks on the religion of the country you will find the defendants not guilty. Take these cartoons. Mr. Foote says they are not attacks upon, and are not intended for caricatures of, Almighty God. If there be such a being, says Mr. Foote, he can have no feeling for Almighty God but profound reverence and awe, but this he says is his mode of holding up to contempt what he calls a caricature of that ineffable Being as delineated in the Hebrew Scriptures. This is for you to try. Look at them and judge for yourselves whether they do or do not come within the widest limits of the law. If they do, then as with the libels find the defendants not guilty. But if you think that they do not come within the most liberal and largest view that any one can give of the law as it exists now, then find them guilty. Whatever may be the consequences—you [* 704] may think the prosecution unwise, you may think the law undesirable, you may think no publications of this sort should ever be made the subject of criminal attack (I do not say you do think so, but you may), it matters not—your duty is to obey the law ; not to strain it in favour of the defendants because you do not like the prosecution ; not to strain it against them because you do not yourselves agree with the statements they advocate, as you are certain entirely to disapprove of the manner in which they advocate them. Take all these alleged libels into your consideration and say whether you find Mr. Foote or Mr. Ramsey, both or either, guilty or not guilty of this publication.

*[705]

APPENDIX C.

A Bill for the abolition of Prosecutions against Laymen for the expression of opinion on matters of Religion.

Whereas certain laws now in force which were intended for the promotion of religion are no longer suitable for that purpose, and it is expedient to repeal them :

Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same as follows :

1. After the passing of this Act no criminal proceedings shall be instituted in any court against any person for schism, heresy, apostasy, blasphemous libel, blasphemy at common law, or atheism ; excepting only proceedings instituted in ecclesiastical courts against spiritual persons of the Church of England, or in the courts of the Church of Scotland against ministers or preachers of that church.

2. The Acts contained in the schedule of this Act, are hereby repealed to the extent in the third column of that schedule mentioned.

3. Provided that nothing herein contained shall be deemed to affect the provisions of an Act passed in the nineteenth year of his late Majesty King George the Second, chapter twenty-one, intituled "An Act more effectually to prevent profane cursing and swearing," or any other provision of any other Act of Parliament not hereby expressly repealed.

* Provided moreover that any person who, with the intention of [*706] wounding the religious feelings of any person or persons, shall in any public place utter any word, or make any gesture, or exhibit any object within the hearing or sight of any person or persons whose religious feelings are likely to be thereby wounded, shall be guilty of a misdemeanour ; and on being convicted thereof, shall be liable to fine or imprisonment, or both, as the court may award, such imprisonment not to exceed the term of one year.

* The language of this concluding proviso is perhaps too wide. It is not intended to impose any restriction whatever on the freest exposition of opinions, however heretical ; and its language might be amended so as to prevent any possible misconstruction. Some such clause is in my opinion desirable, and indeed necessary. (See *ante*, pp. 469, 470.)

4. This Act may be cited as the Religious Prosecutions Abolition Act, 1887.

SCHEDULE.

Session and Chapter.	Title or Short Title.	Extent of Repeal.
1 Edw. 6, c. 1.	An Act against such as shall unreverently speak against the Sacrament of the body and blood of Christ, commonly called the Sacrament of the Altar; and for the receiving thereof in both kinds.	The whole Act.
1 Eliz. c. 2, s 3.	An Act for the uniformity of Common Prayer and Divine Service in the Church and the Administration of the Sacrament	In section 3 the words "shall in any interludes, plays, songs, rhymes, or by other open words, declare or speak anything in the derogation, depraving, or despising of the same book, or of anything therein contained or any part thereof, or."
9 & 10 Wm. 3, c. 35.	An Act for the more effectual suppressing of blasphemy and profaneness.	The whole Act.
6 Geo. 4, c. 47.	An Act for restricting the punishment of leasing, making sedition and blasphemy in Scotland.	So much of the Act as relates to the crime of blasphemy.

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APPENDIX D.

STATUTES.

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APPENDIX OF STATUTES.

THE STATUTE OF CIRCUMSPECTE AGATIS.

13 EDW. I. Stat. 4.

[A.D. 1285.]

THE King to his judges sendeth greeting :—

1. Use yourself circumspectly in all matters concerning the Bishop of Norwich and his clergy, not punishing them if they hold plea, in Court Christian, of such things as be mere spiritual, that is to wit, of penance enjoined by prelates for deadly sin, as fornication, adultery, and such like, for the which sometimes corporal penance, and sometimes pecuniary is enjoined.

6. *And for laying violent hands on a clerk, and in cause of defamation, it hath been granted already, that it shall be tried in a Spiritual Court, when money is not demanded, but* [*a thing done*] *for punishment of sin,* and likewise for breaking an oath.

12. *In causes of defamation, prelates may freely correct, the King's prohibition notwithstanding; first enjoining a corporal penance, which, if the party will redeem, the prelate may lawfully receive the money, though the prohibition be showed.*

[N.B.—The words in italics, being rendered unnecessary by the 18 & 19 Vict. c. 41, are now repealed by the Stat. Law. Revn. Act, 1863, 26 & 27 Vict. c. 125.]

SCANDALUM MAGNATUM.

3 Edw. I. Stat. Westminster I. c. 34 *ante*, p. 134
2 Rich. II. stat. I. c. 5 *ante*, p. 135
12 Rich. II. c. 11 *ante*, p. 136

13 CAR. II. Stat. I. c. 1.

[A.D. 1661.]

Sect. 3. AND to the end that no man hereafter may be misled into any seditious or unquiet demeanour out of an opinion that the Parliament begun and held at Westminster upon the third day of November, in the year of our Lord 1640, is yet in being which is undoubtedly dissolved and determined, and so is hereby declared and adjudged to be fully dissolved and determined, or out of an opinion that there lies an obligation upon him from any oath, covenant, or engagement whatsoever, to endeavour a change of government either in church or state, or out of an opinion that both Houses of Parliament, or either of them have a legislative power without the king, all which assertions have been seditiously maintained in some pamphlets lately printed, and are daily promoted by the [*709] active enemies of our peace and happiness: Be it therefore further enacted by the authority aforesaid, that if any person or persons at any time after the four and twentieth day of June, in the year of our Lord 1661, shall

maliciously and advisedly, by writing, printing, preaching, or other speaking express, publish, utter, declare, or affirm that the Parliament begun at Westminster upon the third day of November, in the year of our Lord 1640, is not yet dissolved, or is not determined, or that it ought to be in being, or hath yet any continuance or existence, or that there lies any obligation upon him or any other person from any oath, covenant, or engagement whatsoever, to endeavour a change of government either in church or state, or that both Houses of Parliament, or either House of Parliament have or hath a legislative power without the king, or any other words to the same effect, that then every such person and persons so aforesaid offending shall incur the danger and penalty of a præmunire mentioned in a statute made in the 16th year of the reign of King Richard the Second. And it is hereby also declared that the oath usually called the solemn league and covenant was in itself an unlawful oath and imposed upon the subjects of this realm against the fundamental laws and liberties of this kingdom, and that all orders and ordinances or pretended orders and ordinances of both or either Houses of Parliament for imposing of oaths, covenants, or engagements, levying of taxes, or raising of forces and arms, to which the royal assent either in person or by commission was not expressly had or given, were in their first creation and making, and still are, and so shall be taken to be null and void to all intents and purposes whatsoever.

See *ante*, pp. 486, 488.

4 WILLIAM & MARY, c. 18.

An Act to prevent malicious informations in the Court of King's Bench.

[A.D. 1692.]

Sect. 1. THE clerk of the crown in the said Court of King's Bench for the time being shall not without express order, to be given by the said court in open court, exhibit, receive, or file any information for any of the causes aforesaid, or issue out any process thereupon, before he shall have taken or shall have delivered to him a recognizance from the person or persons procuring such information to be exhibited with the place of his, her, or their abode, title, or profession, to be entered to the person or persons against whom such information or informations is or are to be exhibited in the penalty of twenty pounds, that he, she, or they will effectually prosecute such informations or information, and abide by and observe such orders as the said court shall direct, which recognizance the said clerk of the crown and also every justice of the peace of any county, city, franchise or town corporate (where the cause of any such information shall arise), are hereby empowered to take, after the taking whereof by the said clerk of the crown, or the receipt thereof from any justice of the peace, the said clerk of the crown shall make an entry thereof upon record, and shall file a memorandum thereof in some public place in his office, that all persons may resort thereunto without fee. And in case any person or persons against whom any information or informations for the causes aforesaid, or any [* 710] of them, shall be exhibited, shall appear thereunto and plead to issue, and that the prosecutor or prosecutors of such information or informations shall not at his and their own proper costs and charges within one whole year next after issue joined therein procure the same to be tried, or if upon such trial a verdict pass for the defendant or defendants, or in case the said informer or informers procure a *noli prosequi* to be entered then in any of the said cases the said Court of King's Bench is hereby authorized to award to the said defendant and defendants, his, her, or their costs, unless the judge before whom such information shall be tried shall at the trial of such information in open court certify upon record that there was a reasonable cause for exhibiting such information. And in case the said informer or informers shall not within three months next after the said costs taxed and demand made thereof, pay to the said defendant or defendants the said costs, then the said defendant and defendants shall have the benefit of the said recognizance to compel them thereunto.

See *ante*, pp. 610, 613.

MR. FOX'S LIBEL ACT.

32 GEO. III. c. 60.

[A. D. 1792.]

An Act to remove doubts respecting the Functions of Juries in Cases of Libel.

WHEREAS doubts have arisen whether on the trial of an indictment or information for the making or publishing any libel, where an issue or issues are joined between the King and the defendant or defendants, or the plea of not guilty pleaded, it be competent to the jury impanelled to try the same to give their verdict upon the whole matter in issue: Be it therefore declared and enacted by the King's most excellent Majesty, and by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, that on every such trial the jury sworn to try the issue may give a general verdict of guilty or not guilty upon the whole matter put in issue upon such indictment or information, and shall not be required or directed by the court or judge before whom such indictment or information shall be tried to find the defendant or defendants guilty merely on the proof of the publication by such defendant or defendants of the paper charged to be a libel, and of the sense ascribed to the same in such indictment or information.

2. Provided always, that on every such trial the court or judge before whom such indictment or information shall be tried shall, according to their or his direction, give their or his opinion and directions to the jury on the matter in issue between the King and the defendant or defendants, in like manner as in other criminal cases.

3. Provided also, that nothing herein contained shall extend or be construed to extend to prevent the jury from finding a special verdict, in their discretion, as in other criminal cases.

[*711] 4. provided also, that in case the jury shall find the defendant or defendants guilty it shall and may be lawful for the said defendant or defendants to move in arrest of judgment, on such ground and in such manner as by law he or they might have done before the passing of this Act, anything herein contained to the contrary notwithstanding.

See *ante*, pp. 94, 362, 604.

39 GEO. III. c. 79.

[A. D. 1799.]

Sect. 28. NOTHING in this Act contained shall extend or be construed to extend to any papers printed by the authority and for the use of either House of Parliament.

Sect. 29. Every person who shall print any paper for hire, reward, gain, or profit, shall carefully preserve and keep one copy (at least) of every paper so printed by him or her, on which he or she shall write, or cause to be written or printed, in fair and legible characters, the name and place of abode of the person or persons by whom he or she shall be employed to print the same, and every person printing any paper for hire, reward, gain or profit who shall omit or neglect to write, or cause to be written or printed as aforesaid, the name and place of his or her employer on one of such printed papers, or to keep or preserve the same for the space of six calendar months next after the printing thereof, or to produce and show the same to any justice of the peace who within the said space of six calendar months shall require to see the same, shall for every such omission, neglect, or refusal forfeit and lose the sum of twenty pounds,

Sect. 31. Nothing herein contained shall extend to the impression of any engraving, or to the printing by letter-press of the name, or the name and address, printing, or business or profession, of any person, and the articles in which he deals, or to any papers for the sale of estates or goods by auction or otherwise

Sect. 34. No person shall be prosecuted or sued for any penalty imposed by this Act, unless such prosecution shall be commenced, or such action shall be brought, within three calendar months next after such penalty shall have been incurred.

Sect. 35. And any pecuniary penalty imposed by this Act, and not exceeding the sum of twenty pounds, shall and may be recovered before any justice or justices of the peace for the county, stewarrty, riding, division, city, town, or place, in which the same shall be incurred, or the person having incurred the same shall happen to be, in a summary way.

Sect. 36. All pecuniary penalties hereinbefore imposed by this Act shall, when recovered in a summary way before any justice, be applied and disposed of in manner hereinafter mentioned; that is to say, one moiety thereof to the informer before any justice, and the other moiety thereof to his Majesty, his heirs and successors.

[N. B.—The above sections are continued and re-enacted by 32 & 33 Vict. c. 24, schedule 2; while other sections of the same statute are repeated by schedule 1.]

[*712] 51 GEO. III. c. 65.

[A. D. 1811.]

Sect. 3. NOTHING in the said Act of the thirty-ninth year of King George the Third, chapter seventy-nine, or in this Act contained, shall extend or be construed to extend to require the name and residence of the printer to be printed upon any bank note, or bank post bill of the Governor and Company of the Bank of England, upon any bill of exchange, or promissory note, or upon any bond or other security for payment of money, or upon any bill of lading, policy of insurance, letter of attorney, deed, or agreement, or upon any transfer or assignment of any public stocks, funds, or other securities, or upon any transfer or assignment of the stocks of any public corporation or company authorized or sanctioned by Act of Parliament, or upon any dividend warrant of or for any such public or other stocks, funds, or securities, or upon any receipt for money or goods, or upon any proceeding in any court of law or equity, or in any inferior court, warrant, order, or other papers printed by the authority of any public board or public officer in the execution of the duties of their respective offices, notwithstanding the whole or any part of the said several securities, instruments, proceedings, matters, and things aforesaid shall have been or shall be printed.

[N. B.—This section is continued and re-enacted by the 32 & 33 Vict. c. 24, schedule 2.]

60 GEO. III. AND 1 GEO IV. c. 8.

An Act for the more effectual Prevention and Punishment of blasphemous and seditious Libels. [30*th December*, 1819.]

WHEREAS it is expedient to make more effectual provision for the punishment of blasphemous and seditious libels: Be it enacted by the King's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that from and after the passing of this Act, in every case in which any verdict or judgment by default shall be had against any person for composing, printing, or publishing any blasphemous libel, or any seditious libel tending to bring into hatred or contempt the person of his Majesty, his heirs or successors, or the Regent, or the government and constitution of the United Kingdom as by law established, or either House of Parliament, or to excite his Majesty's subjects to attempt the alteration of any matter in church or state as by law established, otherwise than by lawful means, it shall be lawful for the judge or the court before whom or in which such verdict shall have been given, or the court in which such judgment by default shall be had, to make an order for the

seizure and carrying away and detaining in safe custody, in such manner as shall be directed in such order, all copies of the libel which shall be in the possession of the person against whom such verdict or judgment shall have been had, or in the possession of any other person named in the order for his use, evidence upon oath having been previously given to the satisfaction of such court or judge, that a copy or copies of the said libel is or are in the possession of such other person for the use of the person against whom such verdict or judgment shall have been had as aforesaid; and in every such case it shall be [*713] lawful for any justice of the peace or for any constable or other peace officer acting under any such order, or for any person or persons acting with or in aid of any such justice of the peace, constable, or other peace officer, to search for any copies of such libel in any house, building, or other place whatsoever belonging to the person against whom any such verdict or judgment shall have been had, or to any other person so named, in whose possession any copies of any such libel, belonging to the person against whom any such verdict or judgment shall have been had, shall be; and in case admission shall be refused or not obtained within a reasonable time after it shall have been first demanded, to enter by force by day into any such house, building, or place whatsoever, and to carry away all copies of the libel there found, and to detain the same in safe custody, until the same shall be restored under the provisions of this Act, or disposed of according to any further order made in relation thereto.

2. And be it further enacted, that if in any such case as aforesaid judgment shall be arrested, or if, after judgment shall have been entered, the same shall be reversed upon any writ of error, all copies so seized shall be forthwith returned to the person or persons from whom the same shall have been so taken as aforesaid, free of all charge and expense, and without the payment of any fees whatever; and in every case in which final judgment shall be entered upon the verdict so found against the person or persons charged with having composed, printed, or published such libel, then all copies so seized shall be disposed of as the court in which such judgment shall be given shall order and direct.

5 GEO. IV. c. 83.

[21*st June*, 1824.]

Sect. 4. Every person wilfully exposing to view, in any street, road, highway, or public place, any obscene print, picture, or other indecent exhibition, ... shall be deemed a rogue and vagabond, within the true intent and meaning of this Act; and it shall be lawful for any justice of the peace to commit such offender (being thereof convicted before him by the confession of such offender, or by the evidence on oath of one or more credible witness or witnesses) to the house of correction, there to be kept to hard labour for any time not exceeding three calendar months.

6 & 7 WILL. IV. c. 76.

[A.D. 1836.]

Sect. 19. If any person shall file any bill in any court for the discovery of the name of any person concerned as printer, publisher, or proprietor of any newspaper, or of any matters relative to the printing or publishing of any newspaper, in order the more effectually to bring or carry on any suit or action for damages alleged to have been sustained by reason of any slanderous or libellous matter contained in any such newspaper respecting such person, it shall not be lawful for the defendant to plead or demur to such bill, but such defendant shall be compellable to make the discovery required; provided always, that such dis- [*714] covery shall not be made use of as evidence or otherwise in any proceeding against the defendant, save only in that proceeding for which the discovery is made.

[N.B —This section applies to Ireland. It was re-enacted by 32 & 33 Vict. c. 24, schedule 2, and therefore remains law, although the original statute, 6 &

7 Will. IV. c. 76, was wholly repealed, without any allusion to this section, by the 33 & 34 Vict. c. 99. See *ante*, pp. 551—553.]

1 & 2 VICT. c. 38.

[A.D. 1838.]

Sect. 2. And whereas by the said recited Act (*i. e.*, *the* 5 *Geo. IV. c.* 83, *s.* 4, *and* NOT *as stated in the margin to the Revised Edition of the Statutes, vol. viii. p.* 216, *the* 5 *Geo. III. c.* 83, *s.* 5) it is enacted, that every person wilfully exposing to view in any street, road, highway, or public place any obscene print, picture, or other indecent exhibition shall, on summary conviction thereof, be liable to punishment as therein provided: And whereas doubts have arisen whether the exposing to public view in the windows of shops in streets, highways, or other public places, of any obscene print, picture, or other indecent exhibition, is an offence within the meaning of the said recited Act: Be it therefore declared and enacted, that every person who shall wilfully expose or cause to be exposed to public view in the window or other part of any shop or other building situate in any street, road, highway, or public place, any obscene print, picture, or other indecent exhibition, shall be deemed to have wilfully exposed such obscene print, picture, or other indecent exhibition to public view within the intent and meaning of the said Act, and shall accordingly be liable to be proceeded against, and on conviction, to be punished under the provisions of the said Act.

2 & 3 Vict. c. 12.

[A.D. 1839.]

Sect. 2. Every person who shall print any paper or book whatsoever which shall be meant to be published or dispersed, and who shall not print upon the front of every such paper, if the same shall be printed on one side only, or upon the first or last leaf of every paper or book which shall consist of more than one leaf, in legible characters, his or her name and usual place of abode or business, and every person who shall publish or disperse, or assist in publishing or dispersing, any printed paper or book on which the name and place of abode of the person printing the same shall not be printed as aforesaid, shall for every copy of such paper so printed by him or her forfeit a sum not more than five pounds: Provided always, that nothing herein contained shall be construed to impose any penalty upon any person for printing any paper excepted out of the operation of the said Act of the thirty-ninth year of King George the Third, chapter seventy-nine, either in the said Act or by any Act made for the amendment thereof.

[*715] Sect. 3. In the case of books or papers printed at the University Press of Oxford, or the Pitt Press of Cambridge, the printer, instead of printing his name thereon, shall print the following words, "Printed at the University Press, Oxford," or "The Pitt Press, Cambridge," as the case may be.

Sect. 4. Provided always, that it shall not be lawful for any person or persons whatsoever to commence, prosecute, enter, or file, or cause or procure to be commenced, prosecuted, entered, or filed, any action, bill, plant, or information in any of her Majesty's Courts, or before any justice or justices of the peace, against any person or persons for the recovery of any fine, penalty, or forfeiture made or incurred, or which may hereafter be incurred, under the provisions of this Act, unless the same be commenced, prosecuted, entered, or filed in the name of Her Majesty's Attorney-General or Solicitor-General in that part of Great Britain called England, or Her Majesty's Advocate for Scotland (as the case may be respectively); and if any action, bill, plaint, or information shall be commenced, prosecuted, or filed in the name or names of any other person or persons than is or are in that behalf before mentioned, the same and every proceeding thereupon had are hereby declared and the same shall be null and void to all intents and purposes.

[N.B.—The above sections are re-enacted by 32 & 33 Vict. c. 24, schedule 2; the rest of the Act is repealed by schedule 1.]

3 & 4 Vict. c. 9.

An Act to give Summary Protection to Persons employed in the Publication of Parliamentary Papers. [14*th April*, 1840.]

WHEREAS it is essential to the due and effectual exercise and discharge of the functions and duties of Parliament, and to the promotion of wise legislation, that no instructions or impediments should exist to the publication of such of the reports, papers, votes, or proceedings of either House of Parliament, as such House of Parliament may deem fit or necessary to be published: And whereas obstructions or impediments to such publication have arisen, and hereafter may arise, by means of civil or criminal proceedings being taken against persons employed by or acting under the authority of the Houses of Parliament, or one of them, in the publication of such reports, papers, votes, or proceedings; by reason and for remedy whereof it is expedient that more speedy protection should be afforded to all persons acting under the authority aforesaid, and that all such civil or criminal proceedings should be summarily put an end to and determined in manner hereinafter mentioned: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled and by the authority of the same, That it shall and may be lawful for any person or persons who now is, or are, or hereafter shall be, a defendant or defendants in any civil or criminal proceedings commenced or prosecuted in any manner soever, for or on account or in respect of the publication of any such report, paper, votes or proceedings by such person or persons, or by his, her, or their servant or servants, by or under the authority of either House of Parliament, to bring before the court in which such proceeding shall have been or shall be so commenced or [*716] prosecuted, or before any judge of the same (if one of the Superior Courts at Westminster), first giving twenty-four hours' notice of his intention so to do to the prosecutor or plaintiff in such proceeding, a certificate under the hand of the Lord Chancellor of Great Britain, or the Lord Keeper of the Great Seal, or of the Speaker of the House of Lords, for the time being, or of the clerk of the Parliament or of the Speaker of the House of Commons, or of the clerk of the same House, stating that the report, paper, votes, or proceedings as the case may be, in respect whereof such civil or criminal proceeding shall have been commenced or prosecuted, was published by such person or persons, or by his, her, or their servant or servants, by order or under the authority of the House of Lords or of the House of Commons, as the case may be, together with an affidavit verifying such certificate; and such court or judge shall thereupon immediately stay such civil or criminal proceeding, and the same, and every writ or process issued therein, shall be and shall be deemed and taken to be finally put an end to, determined, and superseded by virtue of this Act.

2. And be it enacted, that in case of any civil or criminal proceeding hereafter to be commenced or prosecuted for or on account or in respect of the publication of any copy of such report, paper, votes, or proceedings, it shall be lawful for the defendant or defendants at any stage of the proceedings to lay before the court or judge such report, paper, votes, or proceedings, and such copy, with an affidavit verifying such report, paper, votes, or proceedings, and the correctness of such copy, and the court or judge shall immediately stay such civil or criminal proceeding; and the same, and every writ or process issued therein, shall be and shall be deemed and taken to be finally put an end to, determined and superseded by virtue of this Act.

3. And be it enacted, that it shall be lawful in any civil or criminal proceeding to be commenced or prosecuted for printing any extract from or abstract of such report, paper, votes or proceedings, to give in evidence under the general issue, such report, paper, votes or proceedings, and to show that such extract or abstract was published *bonâ fide* and without malice; and if such shall be the opinion of the jury, a verdict of not guilty shall be entered for the defendant or defendants.

4. Provided always, and it is hereby expressly declared and enacted, that nothing herein contained shall be deemed or taken, or held or construed,

directly or indirectly, by implication or otherwise, to affect the privileges of Parliament in any manner whatsoever.

See *ante*, pp. 185, 525.

LORD CAMPBELL'S LIBEL ACT.

6 & 7 VICT. c. 96.

An Act to amend the Law respecting Defamatory Words and Libel.
[*24th August*, 1843.]

For the better protection of private character, and for more effectually securing the liberty of the press, and for better preventing abuses in exercising the said liberty, be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, that in [*717] any action for defamation it shall be lawful for the defendant (after notice in writing of his intention so to do, duly given to the plaintiff at the time of filing or delivering the plea in such action) to give in evidence, in mitigation of damages, that he made or offered an apology to the plaintiff for such defamation before the commencement of the action, or as soon afterwards as he had an opportunity of doing so, in case the action shall have been commenced before there was an opportunity of making or offering such apology.

See *ante*, pp. 322, 542.

2. And be it enacted, that in an action for a libel contained in any public newspaper or other periodical publication it shall be competent to the defendant to plead that such libel was inserted in such newspaper or other periodical publication without actual malice, and without gross negligence, and that before the commencement of the action, or at the earliest opportunity afterwards, he inserted in such newspaper or other periodical publication a full apology for the said libel, or, if the newspaper or periodical publication in which the said libel appeared should be ordinarily published at intervals exceeding one week, had offered to publish the said apology in any newspaper or periodical publication to be selected by the plaintiff in such action, *and that every such defendant shall, upon filing such plea be at liberty to pay into court a sum of money by way of amends for the injury sustained by the publication of such libel, and such payment into court shall be of the same effect and be available in the same manner and to the same extent, and be subject to the same rules and regulations as to payment of costs and the form of pleading, except so far as regards the pleading of the additional facts hereinbefore required to be pleaded by such defendant, as if actions for libel had not been excepted from the personal actions in which it is lawful to pay money into court under an act passed in the session of Parliament held in the fourth year of his late Majesty, intituled "An Act for the further amendment of the law, and the better advancement of justice,"* and that to such plea to such action it shall be competent to the plaintiff to reply generally denying the whole of such plea.

See *ante*, pp. 322, 541, 544, 577.

3. And be it enacted, that if any person shall publish or threaten to publish any libel upon any other person, or shall directly or indirectly threaten to print or publish or shall directly or indirectly propose to abstain from printing or publishing, or shall directly or indirectly offer to prevent the printing or publishing, of any matter or thing touching any other person, with intent to extort any money or security for money, or any valuable thing from such or any other person, or with intent to induce any person to confer or procure for any person any appointment or office of profit or trust, every such offender, on being convicted thereof, shall be liable to be imprisoned, with or without hard labour in the common gaol or house of correction, for any term not exceeding three years: Provided always, that nothing herein contained shall in any manner alter or affect any law now in force in respect of the sending or delivery of threatening letters or writings.

See *ante*, p. 426.

5. And be it enacted, that if any person shall maliciously publish any de-

famatory libel, knowing the same to be false, every such person, being convicted thereof, shall be liable to be imprisoned in the common gaol or house of correction for any term not exceeding two years, and to pay such fine as the court shall award.

See *ante*, pp. 426, 601.

[*718] 5. And be it enacted, that if any person shall maliciously publish any defamatory libel, every such person, being convicted thereof, shall be liable to fine or imprisonment, or both, as the court may award, such imprisonment not to exceed the term of one year.

See *ante*, pp. 385, 426, 438.

6. And be it enacted, that on the trial of any indictment or information for a defamatory libel, the defendant having pleaded such plea as hereinafter mentioned, the truth of the matters charged may be inquired into, but shall not amount to a defence, unless it was for the public benefit that the said matters charged should be published, and that to entitle the defendant to give evidence of the truth of such matters charged as a defence to such indictment or information, it shall be necessary for the defendant, in pleading to the said indictment or information, to allege the truth of the said matters charged in the manner now required in pleading a justification to an action for defamation, and further to allege that it was for the public benefit that the said matters charged should be published, and the particular fact or facts by reason whereof it was for the public benefit that the said matters charged should be published, to which plea the prosecutor shall be at liberty to reply generally, denying the whole thereof; and that if after such plea the defendant shall be convicted on such indictment or information, it shall be competent to the court, in pronouncing sentence, to consider whether the guilt of the defendant is aggravated or mitigated by the said plea, and by the evidence given to prove or to disprove the same: Provided always, that the truth of the matters charged in the alleged libel complained of by such indictment or information shall in no case be inquired into without such plea of justification: Provided also, that in addition to such plea it shall be competent to the defendant to plead a plea of not guilty: Provided also that nothing in this Act contained shall take away or prejudice any defence under the plea of not guilty, which it is now competent to the defendant to make under such plea to any action or indictment, or information, for defamatory words or libel.

See *ante*, pp. 437, 596, 608.

7. And be it enacted, that whensoever, upon the trial of any indictment or information for the publication of a libel, under the plea of not guilty, evidence shall have been given which shall establish a presumptive case of publication against the defendant by the act of any other person by his authority, it shall be competent to such defendant to prove that such publication was made without his authority, consent or knowledge, and that the said publication did not arise from want of due care or caution on his part.

See *ante*, pp. 414, 433—436, 602.

8. And be it enacted, that in the case of any indictment or information by a private prosecutor for the publication of any defamatory libel, if judgment shall be given for the defendant, he shall be entitled to recover from the prosecutor the costs sustained by the said defendant by reason of such indictment or information; and that upon a special plea of justification to such indictment or information, if the issue be found for the prosecutor, he shall be entitled to such plea, such costs so to be recovered by the defendant or prosecutor respectively to be taxed by the proper officer of the court before which the said indictment or information is tried.

See *ante*, pp. 609, 614.

[*719] 9. And be it enacted, that wherever throughout this Act, in describing the plaintiff or the defendant, or the party affected or intended to be affected by the offence, words are used importing the singular number or the masculine gender only, yet they shall be understood to include several persons as well as one person, and females as well as males, unless when the nature of the provision or the context of the Act shall exclude such construction.

10. nothing in this Act contained shall extend to Scotland.

[N.B.—The words in italics, in s. 2, were repealed by the Civil Procedure

Acts Repeal Act, 1879, 42 & 43 Vict. c. 59, Schedule, Part II., as to the Supreme Court of Judicature in England; and generally throughout England by the 46 & 47 Vict. c. 49, s. 4.]

8 & 9 VICT. c. 75.

An Act to amend an Act passed in the Session of Parliament held in the Sixth and Seventh Years of the reign of her present Majesty, intituled "An Act to amend the Law respecting Defamatory Words and Libel." [31*st July*, 1845.]

WHEREAS by an Act passed in the session of Parliament held in the sixth and seventh years of the reign of her present majesty, intituled "An Act to amend the law respecting defamatory words and libel," it is, amongst other things enacted and provided, that the defendant in an action for a libel contained in any public newspaper or other periodical publication may plead certain matters therein mentioned, and may upon filing such plea be at liberty to pay into court a sum of money by way of amends for the injury sustained by the publication of such libel, and it is thereby further enacted, that such payment into court shall be of the same effect, and be available in the same manner and to the same extent, and be subject to the same rules and regulations as to payment of costs and the form of pleading, except so far as regards the pleading of the additional facts hereinbefore required to be pleaded by such defendant, as if action for libel had not been expected from the personal actions in which it is lawful to pay money into court under an Act passed in the session of Parliament held in the fourth year of his late Majesty, intituled "An Act for the further amendment of the law and the better advancement of justice." And whereas the said Act of the fourth year of the reign of his late Majesty relates only to proceedings in the Superior Courts in England, but by an Act passed in the session of Parliament held in the third and fourth years of the reign of her present Majesty, intituled "An Act for abolishing arrest on mesne process in civil actions, except in certain cases, for extending the remedies of creditors against the property of debtors, and for the further advancement of justice, in Ireland," a like provision is made for payment of money into court in all personal actions pending in any of the Superior Courts in Ireland as is contained in the said Act of the fourth year of the reign of his late Majesty in regard to actions pending in the Superior Courts in England, with a like exception of actions for libel, and it is expedient to prevent any doubts as to the application of the said recited Act of the sixth and seventh years of the reign of her present Majesty to actions pending in the Superior Courts in Ireland which may be created by reason of the omission of a reference in the last-mentioned Act to the [*720] said Act of the third and fourth years of the reign of her present Majesty: Be it therefore enacted and declared by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that when in any action pending in the Superior Courts of Ireland for a libel contained in any public newspaper or other periodical publication the defendant shall plead the matters allowed to be pleaded by the said first-mentioned Act, and shall on filing such plea pay money into court as provided by such Act, such payment into court shall be of the same effect, and be available in the same manner and to the same extent, and be subject to the same rules and regulations now in force or hereafter to be made as to payment of costs and the form of pleading except so far as regards the pleading of the additional facts so required to be pleaded by such defendant, as if actions for libel had not been excepted from the personal actions in which it is lawful to pay money into court under the said recited Act of the third and fourth years of the reign of her present Majesty,

2. And be it declared and enacted, that it shall not be competent to any defendant in such action, whether in England or in Ireland, to file any such plea, without at the same time making a payment of money into court by way of amends *as provided by the said Act*, but every such plea so filed without pay-

ment of money into court shall be deemed a nullity, and may be treated as such by the plaintiff in the action.

[N.B.—The words in italics in sect. 2 were repealed by the Civil Procedure Acts Repeal Act, 1879, 42 & 43 Vict. c. 59, Schedule, Part II., as to the Superior Court of Judicature in England; and generally throughout England by the 46 & 47 Vict. c.49, s. 4. The statute 3 & 4 Vict. c. 105, s. 46, referred to in sect. 1, is now repealed by the Stat. Law Rev. Act, 1875. See the C. L. P. Act, 1852 (15 & 16 Vict. c. 76), s. 70; and for Ireland, 16 & 17 Vict. c. 113, s. 77; *ante*, pp. 323, 542]

9 & 10 VICT. c. 33.

[*July 27th*, 1846.]

Sect. 1. It shall not be lawful for any person or persons to commence, prosecute, enter, or file, or cause or procure to be commenced, prosecuted, entered or filed, any action, bill, plaint, or information in any of her Majesty's courts, or before any justice or justices of the peace, against any person or persons for the discovery of any fine which may hereafter be incurred under the provisions of the Act of the thirty-ninth year of King George the Third, chapter seventy-nine, set out in this Act, unless the same be commenced, prosecuted, entered, or filed in the name of her Majesty's Attorney-General or Solicitor-General in England or her Majesty's Advocate in Scotland, and every action, bill, plaint, or information which shall be commenced, prosecuted, entered, or filed in the name or names of any other person or persons than is in that behalf before mentioned, and every proceeding thereupon had, shall be null and void to all intents and purposes.

[N.B.—This section is re-enacted by the 32 & 33 Vict. c. 24. Schedule 2.]

[*721]

11 & 12 VICT. c. 12.

An Act for the better Security of the Crown and Government of the United Kingdom. [*April 22nd*, 1848.]

Sect. 3. If any person whatsoever after the passing of this Act shall, within the United Kingdom or without, compass, imagine, invent, devise, or intend to deprive or depose our most gracious lady the Queen, her heirs or successors, from the style, honour, or royal name of the imperial crown of the United Kingdom, or of any other of her Majesty's dominions and countries, or to levy war against her Majesty, her heirs or successors, within any part of the United Kingdom, in order by force or constraint to compel her or them to change her on their measures or counsels, or in order to put any force or constraint upon or in order to intimidate or overawe both Houses or either House of Parliament, or to move or stir any foreigner or stranger with force to invade the United Kingdom or any other her Majesty's dominions or countries under the obeisance of her Majesty, her heirs or successors, and such compassings, imaginations, inventions, devices, or intentions, or any of them, shall express, utter, or declare, by publishing any printing or writing *or by open and advised speaking*, or by any overt act or deed, every person so offending shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be transported beyond the seas for the term of his or her natural life, or for any term not less than seven years, or to be imprisoned for any term not exceeding two years, with or without hard labour, as the court shall direct.

[N.B.—The words in italics were not in the 36 Geo. III. c. 7.]

COMMON LAW PROCEDURE ACT.

15 & 16 VICT. c. 76.

[*June 30th*, 1852.]

Sect. 61. *In actions of libel and slander the plaintiff shall be at liberty to aver*

that the words or matter complained of were used in a defamatory sense, specifying such defamatory sense without any prefatory averment to show how such words or matter were used in that sense; and such averment shall be put in issue by the denial of the alleged libel or slander, and where the words or matter set forth, with or without the alleged meaning, show a cause of action, the declaration shall be sufficient.

[Repealed by statute 46 & 47 Vict. c. 49; but the rule established by it still remains in full force (sect. 5 (*b*).) See *ante*, pp. 120, 129, and 531.]

[*722] 18 & 19 VICT. c. 41.

An Act for abolishing the Jurisdiction of the Ecclesiastical Courts of England and Wales in suits for Defamation.

[26*th June*, 1855.]

WHEREAS the jurisdiction of the ecclesiastical courts in suits for defamation has ceased to be the means of enforcing the spiritual discipline of the church, and has become grievous and oppressive to the subjects of this realm: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1. From and after the passing of this Act it shall not be lawful for any ecclesiastical court in England or Wales to entertain or adjudicate upon any suit for or cause of defamation, any statute, law, canon, custom, or usage, to the contrary notwithstanding.

20 & 21 VICT. c. 83.

An Act for more effectually preventing the Sale of Obscene Books, Pictures, Prints, and other Articles.

[25*th August*, 1857.]

WHEREAS it is expedient to give additional powers for the suppression of the trade in obscene books, prints, drawings, and other obscene articles: Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. It shall be lawful for any metropolitan police magistrate or other stipendiary magistrate, or for any two justices of the peace, upon complaint made before him or them upon oath that the complainant has reason to believe, and does believe, that any obscene books, papers, writings, prints, pictures, drawings, or other representations are kept in any house, shop, room or other place within the limits of the jurisdiction of any such magistrate or justices, for the purpose of sale or distribution, exhibition for purposes of gain, lending upon hire, or being otherwise published for purposes of gain, which complainant shall also state upon oath that one or more articles of the like character have been sold, distributed, exhibited, lent, or otherwise published as aforesaid, at or in connection with such place, so as to satisfy such magistrate or justices that the belief of the said complainant is well founded, and upon such magistrate or justices being also satisfied that any of such articles so kept for any of the purposes aforesaid are of such a character and description that the publication of them would be a misdemeanour, and proper to be prosecuted as such, to give authority by special warrant to any constable or police officer into such house, shop, room, or other place, with such assistance as may be necessary, to enter in the daytime, and, if necessary, to use force, by breaking open doors or otherwise, and to search for and seize all such books, papers, writings, prints, pictures, drawings, or other representations as aforesaid found in such house, [* 723] shop, room, or other place, and to carry all the articles so seized before the magistrate or justices issuing the said warrant, or some other magistrate or justices exercising the same jurisdiction; and such magistrate or justices shall thereupon issue a summons calling upon the occupier of the house or other place which may have been so entered by virtue of the said warrant to appear within seven days before such police or stipendiary magistrate or any two

justices in petty sessions for the district, to show cause why the articles so seized should not be destroyed; and if such occupier or some other person claiming to be the owner of the said articles shall not appear within the time aforesaid, or shall appear, and such magistrate and justices shall be satisfied that such articles or any of them are of the character stated in the warrant, and that such or any of them have been kept for any of the purposes aforesaid, it shall be lawful for the said magistrate or justices, and he or they are hereby required, to order the articles so seized, except such of them as he or they may consider necessary to be preserved as evidence in some further proceeding, to be destroyed at the expiration of the time hereinafter allowed for lodging an appeal, unless notice of appeal as hereinafter mentioned be given, and such articles shall be in the meantime impounded; and if such magistrate or justices shall be satisfied that the articles seized are not of the character stated in the warrant, or have not been kept for any of the purposes aforesaid, he or they shall forthwith direct them to be restored to the occupier of the house or other place in which they were seized.

2. No plaintiff shall recover in any action for any irregularity, trespass, or other wrongful proceeding made or committed in the execution of this Act, or in, under, or by virtue of any authority hereby given, if tender of sufficient amends shall have been made by or on behalf of the party who shall have committed such irregularity, trespass, or other wrongful proceeding, before such action brought; and in case no tender shall have been made, it shall be lawful for the defendant in any such action, by leave of the court where such action shall depend, at any time before issue joined, to pay into court such sum of money as he shall think fit; whereupon such proceeding, order, and adjudication shall be had and made in and by such court as in other action where defendants are allowed to pay money into court.

3. No action, suit, or information, or any other proceeding, of what nature soever, shall be brought against any person for anything done or omitted to be done in pursuance of this Act, or in the execution of the authorities under this Act, unless notice in writing shall be given by the party intending to prosecute such action, suit, information, or other proceeding, to the intended defendant, one calendar month at least before prosecuting the same, nor unless such action, suit, information, or other proceeding shall be brought or commenced within three calendar months next after the act or omission complained of, or, in case there shall be a continuation of damage, then within three calendar months next after the doing such damage shall have ceased.

4. Any person aggrieved by any act or determination of such magistrate or justice in or concerning the execution of this Act, may appeal to the next general or quarter sessions for the county, riding, division, city, borough, or place in and for which such magistrate or justices shall have so acted, giving to the magistrate or justices of the peace, whose act or determination shall be appealed against, notice in writing of such appeal and of the grounds thereof, within seven days after such act or determination and before the next general [* 724] or quarter sessions, and entering within such seven days into a recognizance, with sufficient surety, before a justice of the peace for the county, city, borough, or place in which such act or determination shall have taken place, personally to appear and prosecute such appeal, and to abide the order of and pay such costs as shall be awarded by such court of quarter sessions or any adjournment thereof; and the court at such general or quarter sessions shall hear and determine the matter of such appeal, and shall make such order therein as shall to the said court seem meet; and such court, upon hearing and finally determining such appeal, shall and may, according to their discretion, award such costs to the party appealing or appealed against as they shall think proper; and if such appeal be dismissed or decided against the appellant or be not prosecuted, such court may order the articles seized forthwith to be destroyed: Provided always, that it shall not be lawful for the appellant on the hearing of any such appeal to go into or give evidence of any other grounds of appeal against any such order, act, or determination, than those set forth in such notice of appeal.

5. This act shall not extend to Scotland.

See *ante*, p. 472.

23 & 24 VICT. c. 32.

An Act to abolish the Jurisdiction of the Ecclesiastical Courts in Ireland in cases of Defamation, &c. [*July 3rd*, 1860.]

[N.B.—The portions of this Act which refer to the jurisdiction of the Ecclesiastical Courts in Ireland are now repealed as unnecessary by the Stat. Rev. Act, 1875, 38 & 39 Vict. c. 66. For the Ecclesiastical Courts themselves are altogether abolished by 32 & 33 Vict. c. 42, s. 21; and on January 1st, 1871, the ecclesiastical law of Ireland ceased to exist as law.]

BURIAL LAWS AMENDMENT ACT, 1880.

43 & 44 Vict. c. 41.

[*September 7th*, 1880.]

Sect. 7. All burials under this Act, whether with or without a religious service, shall be conducted in a decent and orderly manner; and every person guilty of any riotous, violent, or indecent behaviour at any burial under this Act, or wilfully obstructing such burial or any such service as aforesaid thereat, or who shall, in any such churchyard or graveyard as aforesaid, deliver any address, not being part of or incidental to a religious service permitted by this Act, and not otherwise permitted by any lawful authority, or who shall, under colour of any religious services or otherwise, in any such churchyard or graveyard, wilfully endeavour to bring into contempt or obloquy the Christian religion, or the belief or worship of any church or denomination of Christians, or the members or any minister of any such church or denomination, or any other person, shall be guilty of a misdemeanour.

[* 725] NEWSPAPER LIBEL AND REGISTRATION ACT, 1881.

44 & 45 VICT. c. 60.

(See Chapter XIII., *ante*, pp. 374—393.)

An Act to amend the Law of Newspaper Libel, and to provide for the Registration of Newspaper Proprietors. [*27th August*, 1881.]

WHEREAS it is expedient to amend the law affecting civil actions and criminal prosecutions for newspaper libel;

And whereas it is also expedient to provide for the registration of newspaper proprietors:

Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. In the construction of this Act, unless there is anything in the subject or context repugnant thereto, the several words and phrases hereinafter mentioned shall have and include the meanings following; (that is to say,)

The word "registrar" shall mean in England the registrar for the time being of joint stock companies, or such person as the Board of Trade may for the time being authorise in that behalf, and in Ireland the assistant registrar for the time being of joint stock companies for Ireland, or such person as the Board of Trade may for the time being authorise in that behalf.

The phrase "registry office" shall mean the principal office for the time being of the registrar in England or Ireland, as the case may be, or such other office as the Board of Trade may from time to time appoint.

The word "newspaper" shall mean any paper containing public news in-

telligence or occurrences or any remarks or observations therein [*Qy.* thereon] printed for sale and published in England or Ireland periodically or in parts or numbers at intervals not exceeding twenty-six days between the publication of any two such papers, parts or numbers.

Also any paper printed in order to be dispersed and made public weekly or oftener, or at intervals not exceeding twenty-six days, containing only or principally advertisements.

The word "occupation," when applied to any person, shall mean his trade or following, and if none, then his rank or usual title, as esquire, gentleman.

The phrase "place of residence" shall include the street, square, or place where the person to whom it refers shall reside, and the number (if any) or other designation of the house in which he shall so reside.

The word "proprietor" shall mean and include as well the sole proprietor of any newspaper, as also in the case of a divided proprietorship the persons who, as partners or otherwise, represent and are responsible for any share or interest in the newspaper as between themselves and the persons in like manner representing or responsible for the other shares or interests therein, and no other person.

2. Any report published in any newspaper of the proceedings of a public meeting shall be privileged, if such meeting was lawfully convened for a lawful purpose and opened to the public, and if such report was fair and accurate, and published without malice, and if the publication of the matter complained of was [* 726] for the public benefit; provided always, that the protection intended to be afforded by this section shall not be available as a defence in any proceeding, if the plaintiff or prosecutor can show that the defendant has refused to insert in the newspaper in which the report containing the matter complained of appeared a reasonable letter or statement of explanation or contradiction by or on behalf of such plaintiff or prosecutor.

See note, *ante*, pp. 378—383.

3. No criminal prosecution shall be commenced against any proprietor, publisher, editor, or any person responsible for the publication of a newspaper for any libel published therein, without the written fiat or allowance of the Director of Public Prosecutions in England or her Majesty's Attorney-General in Ireland being first had and obtained.

See *ante*, pp. 384, 589, 610.

4. A court of summary jurisdiction, upon the hearing of a charge against a proprietor, publisher, or editor, or any person responsible for the publication of a newspaper, for a libel published therein, may receive evidence as to the publication being for the public benefit, and as to the matters charged in the libel being true, and as to the report being fair and accurate, and published without malice, and as to any matter which under this or any other Act, or otherwise, might be given in evidence by way of defence by the person charged on his trial on indictment, and the court, if of opinion after hearing such evidence that there is a strong or probable presumption that the jury on the trial would acquit the person charged, may dismiss the case.

See *ante*, pp. 385, 590.

5. If a court of summary jurisdiction upon the hearing of a charge against a proprietor, publisher, editor, or any person responsible for the publication of a newspaper for a libel published therein is of opinion that though the person charged is shown to have been guilty the libel was of a trivial character, and that the offence may be adequately punished by virtue of the powers of this section, the court shall cause the charge to be reduced into writing and read to the person charged, and then address a question to him to the following effect: "Do you desire to be tried by a jury or do you consent to the case being dealt with summarily?" and, if such person assents to the case being dealt with summarily, the court may summarily convict him and adjudge him to pay a fine not exceeding fifty pounds.

Section twenty-seven of the Summary Jurisdiction Act, 1879, shall, so far as is consistent with the tenor thereof, apply to every such proceeding as if it were herein enacted and extended to Ireland, and as if the Summary Jurisdiction Acts were therein referred to instead of the Summary Jurisdiction Act, 1848.

See *ante*, pp. 386, 592.

6. Every libel or alleged libel, and every offence under this Act, shall be deemed to be an offence within and subject to the provisions of the Act, of the session of the twenty-second and twenty third years of the reign of Her present Majesty, chapter seventeen, intituled "An Act to prevent vexatious indictments for certain misdemeanours."

See *ante*, pp. 387, 589, 595.

7. Where, in the opinion of the Board of Trade, inconvenience would arise or be caused in any case from the registry of the names of all the proprietors of the newspaper (either owing to minority, coverture, absence from the United Kingdom, minute subdivision of shares, or other special circumstances), it shall [* 727] be lawful for the Board of Trade to authorise the registration of such newspaper in the name or names of some one or more responsible "representative proprietors."

[This section should have come after sect. 10. See *ante*, p. 387.]

8. A register of the proprietors of newspapers as defined by the Act shall be established under the superintendency of the register.

9. It shall be the duty of the printers and publishers for the time being of every newspaper to make or cause to be made to the Registry Office on or before the thirty-first of July one thousand eight hundred and eighty-one, and thereafter annually in the month of July in every year, a return of the following particulars according to Schedule A. hereunto annexed; that is to say,

(*a.*) The title of a newspaper:

(*b.*) The names of all the proprietors of such newspaper together with their respective occupations, places of business (if any), and places of residence.

[The Act did not come into force till August 27th, 1881. See *ante*, pp. 388, 389.]

10. If within the further period of one month after the time hereinbefore appointed for the making of any return as to any newspaper such return be not made, then each printer and publisher of such newspaper shall, on conviction thereof, be liable to a penalty not exceeding twenty five pounds, and also to be directed by a summary order to make a return within a specified time.

11. Any party to a transfer or transmission of or dealing with any share of or interest in any newspaper whereby any person ceases to be a proprietor or any new proprietor is introduced may at any time make or cause to be made to the registry office a return according to the Schedule B. hereunto annexed and containing the particulars therein set forth.

See *ante*, pp. 389, 561.

12. If any person shall knowingly and wilfully make or cause to be made any return by this Act required or permitted to be made in which shall be inserted or set forth the name of any person as a proprietor of a newspaper who shall not be a proprietor thereof, or in which there shall be any misrepresentation, or from which there shall be any omission in respect of any of the particulars by this Act required to be contained therein, whereby such return shall be misleading, or if any proprietor of a newspaper shall knowingly and wilfully permit any such return to be made which shall be misleading as to any of the particulars with reference to his own name, occupation, place of business (if any), or place of residence, then and in every such case every offender being convicted thereof shall be liable to a penalty not exceeding one hundred pounds.

13. It shall be the duty of the registrar and he is hereby required forthwith to register every return made in conformity with the provisions of this Act in a book to be kept for that purpose at the Registry Office and called "the register of newspaper proprietors," and all persons shall be at liberty to search and inspect the said book from time to time during the hours of business at the Registry Office, and any person may require a copy of any entry in or an extract from the book to be certified by the registrar or his deputy for the time being or under the official seal of the registrar.

14. There shall be paid in respect of the receipt and entry of returns made in conformity with the provisions of this Act, and for the inspection of the register of newspaper proprietors, and for certified copies of any entry therein, and in respect of any other service to be performed by the registrar, such fees (if any) as the Board of Trade with the approval of the Treasury may direct and as they

[* 728] shall deem requisite to defray as well the additional expenses of the Registry Office caused by the provisions of this Act, as also the further remunerations and salaries (if any) of the registrar, and of any other person employed under him in the execution of this Act, and such fees shall be dealt with as the Treasury may direct.

See scale of fees, *ante*, p. 391.

15. Every copy of an entry in or extract from the register of newspaper proprietors, purporting to be certified by the registrar or his deputy for the time being, or under the official seal of the registrar, shall be received as conclusive evidence of the contents of the said register of newspaper proprietors, so far as the same appear in such copy or extract without proof of the signature thereto or of the seal of office affixed thereto, and every such certified copy or extract shall in all proceedings, civil or criminal, be accepted as sufficient primâ facie evidence of all the matters and things thereby appearing, unless and until the contrary thereof be shown.

See *ante*, pp. 389, 553, 561.

16. All penalties under this Act may be recovered before a court of summary jurisdiction in manner provided by the Summary Jurisdiction Acts.

Summary orders under this Act may be made by a court of summary jurisdiction, and enforced in manner provided by section thirty-four of the Summary Jurisdiction Act, 1879; and, for the purpose of this Act, that section shall be deemed to apply to Ireland in the same manner as if it were re-enacted in this Act.

17. The expression "a court of summary jurisdiction" has in England the meanings assigned to it by the Summary Jurisdiction Act, 1879; and in Ireland means any justice or justices of the peace, stipendiary or other magistrate or magistrates, having jurisdiction under the Summary Jurisdiction Acts.

The expression "Summary Jurisdiction Acts" has as regards England the meanings assigned to it by the Summary Jurisdiction Act, 1879; and as regards Ireland, means within the police district of Dublin metropolis the Acts regulating the powers and duties of justices of the peace for such district, or of the police of that district, and elsewhere in Ireland the Petty Sessions (Ireland) Act, 1851, and any Act amending the same.

[These definitions should have formed part of s. 1.]

18. The provisions as to the registration of newspaper proprietors contained in this Act shall not apply to the case of any newspaper which belongs to a joint stock company duly incorporated under and subject to the provisions of the Companies Acts, 1862 to 1879.

19. This Act sh ll not extend to Scotland.

20. This Act may for all purposes be cited as the Newpaper Libel and Registration Act, 1881.

[*729] THE SCHEDULES TO WHICH THIS ACT REFERS.

Schedule A.

Return made pursuant to the Newspaper Libel and Registration Act, 1881.

Title of the Newspaper.	Names of the Proprietors.	Occupations of the Proprietors.	Places of business (if any) of the Proprietors.	Places of Residence of the Proprietors.

Schedule B.

Return made pursuant to the Newspaper Libel and Registration Act, 1881.

Title of Newspaper.	Names of Persons who cease to be Proprietors.	Names of Persons who become Proprietors.	Occupation of new Proprietors	Places of business (if any) of new Proprietors	Places of Residence of new Proprietors

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